17 Am. Jur. 2d Consumer Protection One I C Refs.

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection

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Part One. Federal Legislation

I. Overview

C. Credit Advertising

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 35, 61.1, 68

A.L.R. Library

A.L.R. Index, Consumer Protection
A.L.R. Index, Credit Cards
A.L.R. Index, Credit Charges
A.L.R. Index, Truth in Lending
West's A.L.R. Digest, Consumer Credit 35, 61.1, 68

End of Document

17 Am. Jur. 2d Consumer Protection § 90

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

C. Credit Advertising

§ 90. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 35

The Truth in Lending Act regulates credit advertising.[1] The term "advertisement" means a commercial message in any medium that promotes, directly or indirectly, a credit transaction.[2] The term "advertisement" includes only traditional notices offering goods or services for sale and does not include the retail-installment contract.[3]

A catalog or other multiple-page advertisement is considered a single advertisement if it clearly and conspicuously displays a credit-terms table on which the information required to be stated in credit advertising is clearly set forth.[4]

Footnotes

1 15 U.S.C.A. §§ 1661 to 1665b.

2 12 C.F.R. § 1026.2(a)(2).

3 Garza v. Chicago Health Clubs, Inc., 329 F. Supp. 936 (N.D. Ill. 1971).

4 15 U.S.C.A. § 1661.
The implementing regulations are 12 C.F.R. §§ 1026.16(c), 1026.24(d).

17 Am. Jur. 2d Consumer Protection § 91

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

C. Credit Advertising

§ 91. Installments and down payments

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 35

No advertisement to aid, promote, or assist directly or indirectly any extension of consumer credit may state that a specific periodic consumer credit amount or installment amount can be arranged unless the creditor usually and customarily arranges credit payments or installments for that period and in that amount.[1] Similarly, an advertisement that a specified down payment is required in connection with any extension of consumer credit is prohibited unless the creditor usually and customarily arranges down payments in that amount.[2]

Footnotes

1 15 U.S.C.A. § 1662(1).
Regulations requiring that advertised credit terms be actually available are at 12 C.F.R. §§ 1026.16(a), 1026.24(a).

2 15 U.S.C.A. § 1662(2).

End of Document

17 Am. Jur. 2d Consumer Protection § 92

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

C. Credit Advertising

§ 92. Open-end and closed-end credit plans

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 35

Advertisements to aid, promote, or assist directly or indirectly the extension of consumer credit under an open-end credit plan[1] may not set forth any of the specific terms of the plan unless it also clearly and conspicuously sets forth all of the following items: (1) any minimum or fixed amount that could be imposed; (2) in any case in which periodic rates may be used to compute the finance charge, the periodic rates expressed as annual percentage rates; and (3) any other term that the Bureau of Consumer Financial Protection may, by regulation, require to be disclosed.[2]

Under the provisions of the Truth in Lending Act regulating the advertising of credit in closed-end credit plans,[3] if any advertisement states the rate of a finance charge, the advertisement must state the rate of that charge expressed as an annual percentage rate.[4] Furthermore, if the advertisement states the amount of any down payment, the amount of any installment payment, the dollar amount of any finance charge, or the number of installments or the period of repayment, then the advertisement must state all of the following: (1) the down payment, if any; (2) the terms of repayment; and (3) the rate of the finance charge expressed as an annual percentage rate.[5] Additional requirements apply to certain advertisements that relate to a consumer credit transaction secured by the principal dwelling of a consumer in which the extension of credit may exceed the fair market value of the dwelling.[6] The provision governing closed-end credit plans applies to any advertisement to aid, promote, or assist directly or indirectly any consumer credit sale, loan, or other extension of credit subject to the provisions of the Act, other than an open-end credit plan[7] and other than advertisements of residential real estate, except to the extent that the Bureau of Consumer Financial Protection may require by regulation.[8]

Footnotes

1 §§ 31 to 60.

2 15 U.S.C.A. § 1663, implemented by 12 C.F.R. § 1026.16.

3 §§ 61 to 89.

4 15 U.S.C.A. § 1664(c).

5 15 U.S.C.A. § 1664(d).

6 15 U.S.C.A. § 1664(e).

7 15 U.S.C.A. § 1664(a).

8 15 U.S.C.A. § 1664(b).
The implementing regulation is 12 C.F.R. § 1026.24.

End of Document

17 Am. Jur. 2d Consumer Protection § 93

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

C. Credit Advertising

§ 93. Home equity loans

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 35

If any advertisement to aid, promote, or assist, directly or indirectly, the extension of consumer credit through an open-end consumer plan under which extensions of credit are secured by the consumer's principal dwelling states, affirmatively or negatively, any of the specific terms of the plan, including any periodic payment amount, the advertisement must also clearly and conspicuously set forth the following information:

(1) any loan fee, the amount of which is determined as a percentage of the credit limit applicable to an account under the plan and an estimate of the aggregate amount of other fees for opening the account, based on the creditor's experience with the plan, stated as a single amount or a reasonable range;[1]

(2) in any case in which periodic rates may be used to compute the finance charge, the periodic rates expressed at an annual percentage rate;[2]

(3) the highest annual percentage rate that may be imposed under the plan;[3] and

(4) any other information that the Bureau of Consumer Financial Protection may require by regulation.[4]

Any statement in an advertisement for an open-end home equity loan plan that any interest expense incurred with respect to the plan is or may be tax deductible may not be misleading.[5] Each advertisement for an open-end home equity loan plan that relates to an extension of credit that may exceed the fair market value of the dwelling, and which advertisement is disseminated in paper form to the public or through the Internet, as opposed to by radio or television, must include a clear and conspicuous statement that: (1) the interest on the portion of the credit extension that is greater than the fair market value of the dwelling is

not tax deductible for federal income tax purposes; and (2) the consumer should consult a tax adviser for further information regarding the deductibility of interest and charges.[6]

No advertisement with respect to any home equity account may refer to the loan as "free money" or use other terms determined by the Bureau of Consumer Financial Protection by regulation to be misleading.[7]

If an advertisement includes an initial annual percentage rate that is not determined by the index or formula used to make later interest rate adjustments, the advertisement must also state—with equal prominence—the current annual percentage rate that would have been applied using the index or formula had the initial rate not been offered.[8] The annual percentage rate to be disclosed must be current as of a reasonable time, given the media involved.[9] Any advertisement to which the statute applies must also state the period during which the initial annual percentage rate will be in effect.[10]

Any advertisement relating to a home equity loan that contains a statement regarding the minimum monthly payment under the plan must also disclose, if applicable, the fact that the plan includes a balloon payment.[11] The term "balloon payment" means, in this context, any repayment option under which the account holder is required to repay the entire amount of any outstanding balance as of a specified date or at the end of a specified period of time, as determined in accordance with the terms of the agreement under which the credit is extended if the aggregate amount of the minimum periodic payments required would not fully amortize the outstanding balance by that date or at the end of that period.[12]

Footnotes

1 15 U.S.C.A. § 1665b(a)(1).
2 15 U.S.C.A. § 1665b(a)(2).
3 15 U.S.C.A. § 1665b(a)(3).
4 15 U.S.C.A. § 1665b(a)(4), implemented by 12 C.F.R. § 1026.16(d).
5 15 U.S.C.A. § 1665b(b)(1).
6 15 U.S.C.A. § 1665b(b)(2).
7 15 U.S.C.A. § 1665b(c).
8 15 U.S.C.A. § 1665b(d)(1).
9 15 U.S.C.A. § 1665b(d)(2).
10 15 U.S.C.A. § 1665b(d)(3).
11 15 U.S.C.A. § 1665b(e).
12 15 U.S.C.A. § 1665b(f).

17 Am. Jur. 2d Consumer Protection § 94

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

C. Credit Advertising

§ 94. Use of annual percentage rate in oral disclosures

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 35

When responding orally to any inquiry about the cost of credit, a creditor, regardless of the method used to compute finance charges, must state rates only in terms of the annual percentage rate.[1] An exception in the case of an open-end credit plan[2] is that the periodic rate also may be stated, and in the case of any other open-end credit plan where a major component of the finance charge consists of interest computed at a simple annual rate, the simple annual rate also may be stated.[3] The Bureau of Consumer Financial Protection is authorized to adopt regulations in this regard.[4]

Footnotes

1 15 U.S.C.A. § 1665a.
As to determination of the annual percentage rate, see 15 U.S.C.A. § 1606(a), (b).

2 §§ 31 to 60.

3 15 U.S.C.A. § 1665a.

4 15 U.S.C.A. § 1665a, implemented by 12 C.F.R. § 1026.26.

End of Document

17 Am. Jur. 2d Consumer Protection § 95

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection

Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

C. Credit Advertising

§ 95. Enforcement and liabilities

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 35, 61.1, 68

A.L.R. Library

Civil remedies of consumer for violations of Truth in Lending Act (15 USC secs. 1601-1644, 1661-1665), 11 A.L.R. Fed. 815 (sec. 4 superseded in part by Civil remedies of consumer for violations of credit transactions provisions of Truth in Lending Act (TILA) (15 U.S.C.A. secs. 1601 et seq.), as amended by Truth in Lending Simplification and Reform Act of 1982, 113 A.L.R. Fed. 173)

The credit advertising provisions of the Truth in Lending Act may be enforced administratively[1] and by criminal sanctions.[2] However, there is authority that the Act provides no private, civil relief for violations of the credit advertising provisions.[3] In any event, a purchaser can not show a violation of either the credit advertisement provisions of the Truth in Lending Act or the implementing regulations where he or she fails to present any advertisement claimed to have been read by him or her and which violated the Act or regulation.[4]

No liability is imposed under the credit advertising provisions on the part of any owner or personnel of any medium in which an advertisement appears or through which it is disseminated.[5]

Footnotes

1 Jordan v. Montgomery Ward & Co., 442 F.2d 78, 11 A.L.R. Fed. 808 (8th Cir. 1971).
As to administrative enforcement under 15 U.S.C.A. § 1607, see §§ 109 to 112.

2 15 U.S.C.A. § 1611, discussed in § 142.

3 Jordan v. Montgomery Ward & Co., 442 F.2d 78, 11 A.L.R. Fed. 808 (8th Cir. 1971).

4 Hearns v. Parisi, 548 F. Supp. 2d 132 (M.D. Pa. 2008).

5 15 U.S.C.A. § 1665.

End of Document

17 Am. Jur. 2d Consumer Protection One I D Refs.

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

D. Credit Billing

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 8, 30, 61.1 to 63, 68

A.L.R. Library

A.L.R. Index, Consumer Protection
A.L.R. Index, Credit Cards
A.L.R. Index, Credit Charges
A.L.R. Index, Truth in Lending
West's A.L.R. Digest, Consumer Credit 8, 30, 61.1 to 63, 68

End of Document

17 Am. Jur. 2d Consumer Protection § 96

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

D. Credit Billing

§ 96. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 30, 61.1 to 63, 68

Forms

Forms relating to billing error rights, see Am. Jur. Legal Forms 2d—Consumer Credit Protection Acts [Westlaw® Search Query]

One of the purposes of the Truth in Lending Act is to protect consumers against inaccurate and unfair credit billing practices.[1] The relevant statutory provisions[2] are popularly known as the Fair Credit Billing Act.[3]

Civil liability under the Truth in Lending Act encompasses creditors who fail to comply with the Fair Credit Billing Act.[4]

Footnotes

1 15 U.S.C.A. § 1601(a).

2 15 U.S.C.A. §§ 1666 to 1666j.

3 As to the relation of the Act to state law, see §§ 261 to 263.

4 15 U.S.C.A. § 1640(a), discussed in § 124.

End of Document

17 Am. Jur. 2d Consumer Protection § 97

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

D. Credit Billing

§ 97. Correction of billing errors

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 30

A.L.R. Library

Validity, Construction, and Application of Truth in Lending Act (TILA) and Regulations Promulgated Thereunder—United States Supreme Court Cases, 67 A.L.R. Fed. 2d 567

Forms

Forms relating to billing errors, generally, see Am. Jur. Legal Forms 2d—Consumer Credit Protection Acts; Am. Jur. Pleading and Practice Forms—Truth in Lending and Consumer Credit Protection; Federal Procedural Forms (L.Ed.)—Consumer Credit Protection [Westlaw® Search Query]

The Fair Credit Billing Act provides a procedure for the correction of billing errors.[1]

Definition:

A "billing error" consists of any of the following:[2]

(1) a reflection on a statement of an extension of credit, which was not made to the obligor or, if made, was not in the amount reflected on that statement;

(2) a reflection on a statement of an extension of credit for which the obligor requests additional clarification including documentary evidence;

(3) a reflection on a statement of goods or services not accepted by the obligor or his or her designee or not delivered in accordance with the agreement made at the time of a transaction;

(4) the creditor's failure to reflect on a statement a payment made by the obligor or a credit issued to the obligor;

(5) a computation error or similar error of an accounting nature of the creditor on a statement;

(6) a failure to transmit a statement pertaining to periodic disclosures to the last address of the obligor that has been disclosed to the creditor, unless that address was furnished less than 20 days before the end of the billing cycle for which the statement is required; or

(7) any other error described in regulations of the Bureau of Consumer Financial Protection.

A creditor's demand for payment on an account, from someone who is allegedly not an obligor on the account, qualifies as a "billing error."[3] However, a bank's actions in reporting the closing of a customer's checking account to a third-party company does not amount to "billing error" as defined by the Fair Credit Billing Act.[4]

The implementing regulation explains the statutory definition[5] and is entitled to substantial deference when construing the statute.[6]

Where a creditor has transmitted to an obligor an account statement in connection with an extension of consumer credit and within 60 days[7] receives a written notice[8] from the obligor in which the obligor sets forth information identifying his or her name and account number, if any,[9] and a belief that the statement contains a billing error and its amount[10] and the reasons for this belief,[11] the creditor must generally comply with two separate statutory requirements: No later than 30 days after receiving the notice, the creditor must send a written acknowledgment to the obligor,[12] and no later than two complete billing cycles (in no event later than 90 days) after the receipt of the notice and prior to taking any action to collect the amount, or any part of it, indicated by the obligor,[13] the creditor must either make appropriate corrections to the account[14] or send a written explanation or clarification to the obligor, after having conducted an investigation, setting forth the reasons why the creditor believes the statement was correct.[15] A creditor to whom these requirements apply has no further responsibility after complying with the statutory provisions described above if the obligor continues to make substantially the same allegation with respect to the error.[16]

The billing-error provision applies only where a statement of account is sent in connection with an extension of "consumer credit" as that term is used in the Truth in Lending Act.[17] Thus, a creditor is not required to follow these procedures when a billing dispute involves credit extended under a credit card issued in the name of a corporation and corporate officials for a "company account" designed for business purposes and issued upon the corporation's credit rating.[18] Since the statute deals with billing errors, its 60-day notice requirement does not apply to claims of unauthorized credit card use.[19] Also, an exception to these requirements is made where the obligor, after giving written notice and before the expiration of statutory time limits, agrees that the statement was correct.[20]

Caution:

A creditor who fails to comply with the provision governing the correction of billing errors forfeits any right to collect the amount indicated in the written notice and any finance charges on that amount, but the forfeiture is limited to $50.[21]

Footnotes

1 15 U.S.C.A. § 1666.
A brief, nontechnical description of the procedural provisions pertaining to billing errors is found in American Exp. Co. v. Koerner, 452 U.S. 233, 101 S. Ct. 2281, 68 L. Ed. 2d 803 (1981).
An alleged billing error on an earlier account with the issuer—which led to a delinquency and was a partial basis for the denial of a credit card—did not violate the statute where the applicant never informed the issuer of the alleged error. Payne v. Diner's Club Intern., 696 F. Supp. 1153 (S.D. Ohio 1988).
As to credit cards, generally, see Am. Jur. 2d, Credit Cards and Charge Accounts §§ 21 et seq.

2 15 U.S.C.A. § 1666(b).

3 Belmont v. Associates Nat. Bank (Delaware), 119 F. Supp. 2d 149 (E.D. N.Y. 2000).

4 Owusu v. New York State Ins., 655 F. Supp. 2d 308, 70 U.C.C. Rep. Serv. 2d 65 (S.D. N.Y. 2009).

5 12 C.F.R. § 1026.13(a).

6 American Exp. Co. v. Koerner, 452 U.S. 233, 101 S. Ct. 2281, 68 L. Ed. 2d 803 (1981).

7 15 U.S.C.A. § 1666(a).
The 60-day notice period begins to run when the disputed statement is first received. Pinner v. Schmidt, 805 F.2d 1258 (5th Cir. 1986).
A customer's allegations that the bank sent her a statement about a credit card she had been issued at a jewelry store and that she sent notice to the bank disputing the charges were insufficient to plead that she provided notice of her dispute to the store within 60 days as required for her action alleging violations of the Fair Credit Billing Act. Middleton v. Rogers Ltd., Inc., 804 F. Supp. 2d 632 (S.D. Ohio 2011).

8 15 U.S.C.A. § 1666(a), providing that this notice must be other than notice on a payment stub or other payment medium supplied by the creditor if the creditor so stipulates in the disclosure document.

9 15 U.S.C.A. § 1666(a)(1).

10 15 U.S.C.A. § 1666(a)(2).
A letter to a creditor regarding apparent double billing of the obligor's credit card accounts gave the creditor sufficient notice of a billing error, even if it did not include details as to amounts or specific transactions being disputed, where it noted that an account under the obligor's maiden name, which she had attempted

to close four years earlier, contained entries in the same amount as those appearing on statements for an account in her married name and materials faxed to the creditor's customer service representatives limited the dispute to two instances of double billing. Burnstein v. Saks Fifth Ave. & Co., 208 F. Supp. 2d 765 (E.D. Mich. 2002), judgment aff'd, 85 Fed. Appx. 430 (6th Cir. 2003).

A debtor failed to notify a credit card company of the existence of a billing error where the debtor alleged that his letters asserted not one but two valid billing errors: a request for clarification and documentary evidence and a computation error, but the debtor's letter disputed the entire balance due on his account and requested verification and documentation of every purchase, interest charge, fee, and payment (or prepayment) on his account from its inception. Hill v. Chase Bank USA, N.A., 2010 WL 107192 (N.D. Ind. 2010).

As to credit cards, generally, see Am. Jur. 2d, Credit Cards and Charge Accounts §§ 21 et seq.

11 15 U.S.C.A. § 1666(a)(3).

12 15 U.S.C.A. § 1666(a)(A).

13 The term "action to collect the amount, or any part thereof, indicated by an obligor" is defined in 15 U.S.C.A. § 1666(c).

14 15 U.S.C.A. § 1666(a)(B)(i).

15 15 U.S.C.A. § 1666(a)(B)(ii), providing further that the creditor must furnish copies of documentary evidence of the debt upon request.

A creditor was not required to conduct an investigation where the consumer did not provide a notice disputing the statement within the 60-day time limit. Dawkins v. Sears Roebuck and Co., 109 F.3d 241 (5th Cir. 1997).

16 15 U.S.C.A. § 1666(a).

12 C.F.R. § 1026.13 provides further detail with regard to resolving billing errors.

17 American Exp. Co. v. Koerner, 452 U.S. 233, 101 S. Ct. 2281, 68 L. Ed. 2d 803 (1981).

As to the definition of "consumer credit," see § 7.

18 American Exp. Co. v. Koerner, 452 U.S. 233, 101 S. Ct. 2281, 68 L. Ed. 2d 803 (1981).

19 Crestar Bank, N.A. v. Cheevers, 744 A.2d 1043 (D.C. 2000).

As to unauthorized use of credit cards, see Am. Jur. 2d, Credit Cards and Charge Accounts §§ 35 to 44.

20 15 U.S.C.A. § 1666(a).

21 15 U.S.C.A. § 1666(e).

End of Document

17 Am. Jur. 2d Consumer Protection § 98

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

D. Credit Billing

§ 98. Prohibition on closing account or reporting to credit agency during dispute

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 30

Forms

Forms relating to reporting of delinquency, generally, see Am. Jur. Pleading and Practice Forms—Truth in Lending and Consumer Credit Protection; Federal Procedural Forms (L.Ed.)—Consumer Credit Protection [Westlaw® Search Query]

A creditor operating an open-end consumer credit plan may not, prior to sending the required written explanation or clarification,[1] restrict or close an account for which the obligor has given a notice of a billing error solely because of the obligor's failure to pay the amount indicated to be in error.[2] This requirement is triggered by a letter from a credit card holder concerning a failure to credit prepayments, which meets the statutory requirements,[3] in which case the issuer may not rely on a provision of the account agreement allowing it to revoke the card at any time without cause.[4] However, the statute does not prevent the creditor from applying the disputed amount against the account's credit limit.[5]

After receiving a written notice from the obligor of an alleged billing error, the creditor or its agent may not threaten to report adversely on the obligor's credit rating or standing because of a failure to pay the disputed amount.[6] The creditor may not report that amount as delinquent until the creditor has complied with the required procedures.[7] This restriction applies only to reports following notices of billing errors.[8]

Provision is made concerning credit reporting in the case of a continuing dispute[9] and reporting the subsequent resolution of a continuing dispute.[10]

Footnotes

1 § 97.

2 15 U.S.C.A. § 1666(d).

3 § 97.

4 Gray v. American Exp. Co., 743 F.2d 10 (D.C. Cir. 1984).
As to credit cards, generally, see Am. Jur. 2d, Credit Cards and Charge Accounts §§ 21 et seq.

5 15 U.S.C.A. § 1666(d).

6 15 U.S.C.A. § 1666a(a).

7 15 U.S.C.A. § 1666a(a).
A credit card holder stated claim against a bank under state law on allegations that the bank, in violation of the Fair Credit Billing Act, had attempted to collect a disputed charge and reported it to credit agencies as delinquent without first providing a written explanation. Lyon v. Chase Bank USA, N.A., 656 F.3d 877 (9th Cir. 2011).

8 Doyle v. Household Credit Services, Inc., 844 F. Supp. 13 (D. Me. 1994) (a creditor that erroneously stated to credit reporting agencies that the debtor had filed for bankruptcy was not liable since this was not a "billing error").

9 15 U.S.C.A. § 1666a(b).

10 15 U.S.C.A. § 1666a(c).

End of Document

17 Am. Jur. 2d Consumer Protection § 99

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

D. Credit Billing

§ 99. Prompt billing and crediting of payments; refunds

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 30

Forms

Forms relating to improper charge or failure to credit account, generally, see Am. Jur. Pleading and Practice Forms—Truth in Lending and Consumer Credit Protection; Federal Procedural Forms (L.Ed.)—Consumer Credit Protection [Westlaw® Search Query]

If an open-end consumer credit plan provides a time period within which an obligor may repay any portion of the credit extended without incurring an additional finance charge, such additional finance charge may not be imposed with respect to such portion of the credit extended for the billing cycle of which such period is a part unless a statement which includes the amount upon which the finance charge for the period is based was mailed or delivered to the consumer not later than 21 days before the date specified in the statement by which payment must be made in order to avoid imposition of that finance charge.[1]

Payments received under an open-end consumer credit plan must be posted promptly to the obligor's account as specified by a regulation, which prevents a finance charge from being imposed on an obligor, if the creditor has received the obligor's payment in a readily identifiable form, by 5:00 p.m. on the date on which such payment is due, in the amount, manner, and location indicated by the creditor to avoid having the charge imposed.[2]

Whenever a credit balance in excess of $1 is created in connection with a consumer credit transaction—through the transmittal of funds to a creditor in excess of the total balance due on an account, rebates of unearned finance charges or insurance premiums, or amounts otherwise owed to, or held for the benefit of, an obligor—the creditor must credit the amount of the credit balance to the consumer's account, refund any part of the amount of the remaining credit balance upon the consumer's request, and make a good-faith effort to refund to the consumer any part of the credit balance remaining in the account for more than six months unless the consumer's current location is unknown and cannot be traced through his or her last-known address or telephone number.[3]

Footnotes

1 15 U.S.C.A. § 1666b(b).

2 15 U.S.C.A. § 1666c, implemented by 12 C.F.R. § 1026.10.

3 15 U.S.C.A. § 1666d.
Regulations on the treatment of credit balances are at 12 C.F.R. §§ 1026.11, 1026.21.

17 Am. Jur. 2d Consumer Protection One I E Refs.

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

E. Consumer Leases

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 30, 33.1, 34, 35, 51, 54, 61 to 68

A.L.R. Library

A.L.R. Index, Consumer Protection
West's A.L.R. Digest, Consumer Credit 30, 33.1, 34, 35, 51, 54, 61 to 68

End of Document

17 Am. Jur. 2d Consumer Protection § 100

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection

Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

E. Consumer Leases

§ 100. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 30, 33.1, 34, 51, 54

A.L.R. Library

Construction and application of Consumer Leasing Act (15 U.S.C.A. secs. 1667-1667e), 129 A.L.R. Fed. 587

The Consumer Leasing Act of 1976[1] was enacted to assure meaningful disclosure of the terms of leases of personal property for personal, family, or household purposes so as to enable the lessee to compare the various available lease terms, limit balloon payments, enable a comparison between lease and credit terms where appropriate, and assure meaningful and accurate disclosures of lease terms in advertisements.[2] The statutory provisions are implemented by Regulation M,[3] which includes model consumer leasing forms.[4]

As a consumer protection statute that is remedial in nature, the Consumer Leasing Act must be liberally construed in the consumer's favor.[5]

A consumer lease governed by the Consumer Leasing Act is subject to the nondiscrimination provisions of the Equal Credit Opportunity Act.[6]

Footnotes

1 15 U.S.C.A. §§ 1667 to 1667f.

2 15 U.S.C.A. § 1601(b).

3 12 C.F.R. Pt. 1013.

4 12 C.F.R. Pt. 1013, App. A.

5 Mitchell v. Ford Motor Credit Co., 702 F. Supp. 2d 1356 (M.D. Fla. 2010).

6 Brothers v. First Leasing, 724 F.2d 789 (9th Cir. 1984).
As to the Equal Credit Opportunity Act, see §§ 147, 148.

End of Document

17 Am. Jur. 2d Consumer Protection § 101

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

E. Consumer Leases

§ 101. Definitions; exemptions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 30, 33.1, 34

A.L.R. Library

Construction and application of Consumer Leasing Act (15 U.S.C.A. secs. 1667-1667e), 129 A.L.R. Fed. 587
Lease with option to purchase agreement as credit sale or consumer lease under definitions in Truth in Lending Act (15 U.S.C.A. secs. 1602(g), 1667(1)) and applicable regulations, 58 A.L.R. Fed. 929

The basic term used in the Consumer Leasing Act is "consumer lease," which means a contract in the form of a lease or bailment for the use of personal property by a natural person for a specified time and not exceeding a specified amount, primarily for personal, family, or household purposes, regardless of whether the lessee has the option to purchase or otherwise become the owner of the property at the expiration of the lease.[1] The term does not include a credit sale[2] nor a lease for agricultural, business, or commercial purposes, or to a government or governmental agency or instrumentality, or to an organization.[3]

A lessor is a person who is regularly engaged in leasing, offering to lease, or arranging to lease under a consumer lease.[4] The statute also defines the terms "lessee,"[5] "personal property,"[6] and "security" and "security interest."[7]

Footnotes

1 15 U.S.C.A. § 1667(1).

2 As defined in 15 U.S.C.A. § 1602(h), discussed in § 12.

3 15 U.S.C.A. § 1667(1).

4 15 U.S.C.A. § 1667(3).

5 15 U.S.C.A. § 1667(2).

6 15 U.S.C.A. § 1667(4).

7 15 U.S.C.A. § 1667(5).

End of Document

17 Am. Jur. 2d Consumer Protection § 102

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

E. Consumer Leases

§ 102. Disclosures

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 51, 54

A.L.R. Library

Construction and application of Consumer Leasing Act (15 U.S.C.A. secs. 1667-1667e), 129 A.L.R. Fed. 587

The Truth in Lending Act generally provides that a lessor must disclose to the person who is obligated on a consumer lease the information required under that Act.[1] The Consumer Leasing Act, nevertheless, imposes specific requirements as to consumer lease disclosures. Prior to the consummation of a lease, a lessor must give the lessee a dated, written statement, on which the lessor and lessee are identified, setting out accurately and in a clear and conspicuous manner[2] specified information with respect to the lease.[3] The disclosures may be made in the lease contract.[4]

The disclosures must include the following information:[5]

(1) a description or identification of the leased property;

(2) the amount of any payment required at the inception of the lease;

(3) the amount paid or payable for official fees, registration, certificate of title, or license fees or taxes;

(4) the amount of other charges not included in the periodic payments and a description of the charges, including whether the lessee will be liable for the difference between the anticipated fair market value of the leased property and its appraised actual value when the lease terminates;[6]

(5) a statement of the amount or method of determining the amount of any liability the lease imposes upon the lessee at the end of the term, and whether the lessee has the option to purchase the property, and at what price and time;

(6) a statement identifying warranties and guarantees;

(7) a description of insurance provided or paid by the lessor or required of the lessee;

(8) a description of any security interest retained by the lessor and a clear identification of the property to which the security interest relates;

(9) the number, amount, and due dates or periods of payments and the total amount of periodic payments;

(10) where the lease provides that the lessee is liable for the anticipated fair market value of the property on the expiration of the lease, the fair market value at the inception of the lease, the aggregate cost of the lease on expiration, and the differential between them; and

(11) a statement of the conditions under which the lease may be terminated prior to the end of the term and the amount or method of determining any penalty or other charge for a delinquency, default, late payments, or early termination.

It may be provided by regulation that any portion of the information that must be disclosed may be given in the form of estimates where the lessor is not in a position to know exact information.[7]

With regard to interest on security deposits, the disclosure of "other charges payable by the lessee"[8] does not include amounts paid by a bank to a leasing corporation for holding security deposits.[9] An indemnification payment sought by an excess insurer of leaseholders is also not a type of "other charge" contemplated by the Act.[10] On the other hand, an automobile lessee's claim that the lessor's practice of not disclosing that it retains interest earned on security deposits violated the Act[11] was not dismissed where under the state's version of the Uniform Commercial Code, the interest is retained as additional security, and this must be disclosed.[12]

The requirement that a statement identifying warranties and guarantees be included in the disclosure[13] is not satisfied by a statement in an automobile lease that the vehicle may be protected by a separate, written warranty from the manufacturer.[14]

With reference to the disclosure of penalties upon delinquency or default,[15] it may be necessary for the paragraph on late payment charges to disclose how a delinquency charge is computed when part of the payment is made on time.[16] The lessor must also disclose how the penalty on early termination would be discounted for unearned interest.[17] The anticipated residual value of the vehicle must be disclosed where it is known at the lease inception and is needed to calculate the early termination penalty.[18] A lessor does not violate the Act by disclosing a penalty that would be unenforceable under state law.[19]

CUMULATIVE SUPPLEMENT

Cases:

Dog lessor's allegation that consumer pet lease agreement provided false disclosure of the total amount of periodic payments owed by inaccurately providing a total of all monthly payments, omitting warranty fee, disposition fee, and purchase option fee from total amount owed, plausibly alleged violations of Consumer Leasing Act (CLA) and its implementing regulation. Truth in Lending Act § 181, 15 U.S.C.A. § 1667 et seq.; 12 C.F.R. § 1013; Fed. R. Civ. P. 12(b)(6). Danger v. Nextep Funding, LLC, 355 F. Supp. 3d 796 (D. Minn. 2019).

[END OF SUPPLEMENT]

Footnotes

1 15 U.S.C.A. § 1631(a).

2 § 103.

3 15 U.S.C.A. § 1667a.

4 15 U.S.C.A. § 1667a.

5 15 U.S.C.A. § 1667a.

6 As to restrictions on the lessee's liability based on the actual value of the property on termination, see §§ 104, 105.

7 15 U.S.C.A. § 1667a (concluding paragraph), implemented by 12 C.F.R. § 1013.4.

8 15 U.S.C.A. § 1667a(4).

9 Turner v. General Motors Acceptance Corp., 180 F.3d 451 (2d Cir. 1999); Lawson v. Bank One, Lexington, N.A., 35 F. Supp. 2d 961, 38 U.C.C. Rep. Serv. 2d 599 (E.D. Ky. 1997).

10 Tokio Marine v. Macready, 803 F. Supp. 2d 193 (E.D. N.Y. 2011).

11 15 U.S.C.A. § 1667a(8).

12 Demitropoulos v. Bank One Milwaukee, N.A., 924 F. Supp. 894, 30 U.C.C. Rep. Serv. 2d 337 (N.D. Ill. 1996).

13 15 U.S.C.A. § 1667a(6).

14 Highsmith v. Chrysler Credit Corp., 18 F.3d 434, 129 A.L.R. Fed. 767 (7th Cir. 1994).

15 15 U.S.C.A. § 1667a(11).

16 Demitropoulos v. Bank One Milwaukee, N.A., 915 F. Supp. 1399 (N.D. Ill. 1996).

17 Highsmith v. Chrysler Credit Corp., 18 F.3d 434, 129 A.L.R. Fed. 767 (7th Cir. 1994).

18 Applebaum v. Nissan Motor Acceptance Corp., 226 F.3d 214 (3d Cir. 2000); Anderson v. Ford Motor Credit Corp., 323 Md. 327, 593 A.2d 678 (1991).
As to the requirement that the estimate be reasonable, see §§ 104, 105.

19 Highsmith v. Chrysler Credit Corp., 18 F.3d 434, 129 A.L.R. Fed. 767 (7th Cir. 1994).

End of Document

17 Am. Jur. 2d Consumer Protection § 103

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

E. Consumer Leases

§ 103. Disclosures—Conspicuousness requirement

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 51

A.L.R. Library

Construction and application of Consumer Leasing Act (15 U.S.C.A. secs. 1667-1667e), 129 A.L.R. Fed. 587

It has been said that the requirement that the disclosures be made in a "clear and conspicuous manner"[1] refers to the method of presentation, not necessarily the comprehensibility of the disclosures,[2] but it has also been held that disclosures made in a Byzantine manner, beyond the comprehension of the average consumer, are not clear.[3] Under the first view, disclosures that early termination charges would be computed under the "sum of the digits method"[4] or the "constant yield method"[5] are sufficient even though these methods are not further explained.[6]

The requirement of a clear and conspicuous disclosure does not bar the enforcement of terms appearing below the signature line and on the back side of an automobile lease agreement, at least where the agreement contained a statement in all capital letters above the signature line stating that the lessee should read the entire agreement before signing it, and a statement that signing the agreement was an acknowledgement that the lessee read it.[7] The use of cross-references does not violate the clear and conspicuous disclosure requirement.[8]

An automobile lessor failed to comply with the clear disclosure requirement, where a necessary term did not appear in the lease or any other document provided to the lessee prior to the consummation of the lease, even though the lease contained a provision that the lessee had been given a completed copy of the lease at the time he or she signed it.[9] There is disagreement whether the use of the abbreviation "N.A." to state the net value of a trade-in violates the clear and conspicuous disclosure requirement.[10]

Footnotes

1 15 U.S.C.A. § 1667a.

2 Channell v. Citicorp Nat. Services, Inc., 89 F.3d 379 (7th Cir. 1996).

3 Lundquist v. Security Pacific Automotive Financial Services Corp., 993 F.2d 11, 25 Fed. R. Serv. 3d 828 (2d Cir. 1993).
The language of an early termination provision in a vehicle lease agreement was unduly convoluted and failed to disclose early termination penalties in a clear and conspicuous manner, violating the Act, where a reader had to comprehend numerous accounting concepts to determine the adjusted lease balance. Clement v. American Honda Finance Corp., 145 F. Supp. 2d 206 (D. Conn. 2001).

4 Channell v. Citicorp Nat. Services, Inc., 89 F.3d 379 (7th Cir. 1996).

5 Jordan v. Toyota Motor Credit Corp., 236 F.3d 866 (7th Cir. 2001).

6 Jordan v. Toyota Motor Credit Corp., 236 F.3d 866 (7th Cir. 2001); Channell v. Citicorp Nat. Services, Inc., 89 F.3d 379 (7th Cir. 1996).

7 Hildabrand v. DiFeo Partnership, Inc., 89 F. Supp. 2d 202 (D. Conn. 2000).

8 Highsmith v. Chrysler Credit Corp., 18 F.3d 434, 129 A.L.R. Fed. 767 (7th Cir. 1994).

9 Anderson v. Ford Motor Credit Corp., 323 Md. 327, 593 A.2d 678 (1991).

10 Myers v. Hexagon Co., L.L.C., 54 F. Supp. 2d 742 (E.D. Tenn. 1998) (abbreviation not clear and conspicuous); Blum v. General Motors Acceptance Corp., 185 Ga. App. 714, 365 S.E.2d 474 (1988) (not a violation where the lessee admitted that he did not have equity in his trade).

17 Am. Jur. 2d Consumer Protection § 104

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

E. Consumer Leases

§ 104. Liability for difference between estimated and actual residual value

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 54

A.L.R. Library

Construction and application of Consumer Leasing Act (15 U.S.C.A. secs. 1667-1667e), 129 A.L.R. Fed. 587

Where a lessee's liability on expiration of a consumer lease is based on the estimated residual value of the property, the estimated residual value must be a reasonable approximation of the anticipated actual fair market value of the property on the expiration of the lease.[1]

There is a rebuttable presumption that the estimated residual value is unreasonable to the extent that it exceeds the actual residual value by more than three times the average payment allocable to a monthly period under the lease.[2] Such a discrepancy also gives rise to a rebuttable presumption that the estimate was not made in good faith, and the lessor may not collect from the lessee the amount of the excess liability unless the lessor brings a successful action, in which the lessor must pay the lessee's reasonable attorney's fees.[3] These presumptions do not apply in cases involving physical damage to the property or excessive use.[4]

Under the provision requiring that the lessor pay the lessee's attorney's fees, the fees should be based on current rates but may be based on the rate in effect when the work was performed where the fee award is determined several years after the trial, and the court need not justify each decision to disallow some of the attorney's time.[5]

If a lease has a residual value provision, the lessee may obtain, at his or her expense, a professional appraisal by an independent third person agreeable to both parties, and the appraisal is final and binding.[6] Thus, an automobile lessor may impose an early-termination charge under a lease that makes the lessee responsible for the difference between the realized and residual values so long as the lessor provides notice of the charge and of the right to an appraisal.[7]

Footnotes

1 15 U.S.C.A. § 1667b(a).

2 15 U.S.C.A. § 1667b(a).

3 15 U.S.C.A. § 1667b(a).

4 15 U.S.C.A. § 1667b(a) (providing that the lessor may set reasonable standards).
The presumption did not apply where a leased truck had been destroyed in an accident. Wilson v. World Omni Leasing, Inc., 540 So. 2d 713, 8 U.C.C. Rep. Serv. 2d 628 (Ala. 1989).

5 Mares v. Credit Bureau of Raton, 801 F.2d 1197 (10th Cir. 1986).

6 15 U.S.C.A. § 1667b(c).

7 Torres v. Banc One Leasing Corp., 226 F. Supp. 2d 1345, 51 U.C.C. Rep. Serv. 2d 1139 (N.D. Ga. 2002), aff'd in part, vacated in part on other grounds, remanded, 348 F.3d 972, 51 U.C.C. Rep. Serv. 2d 1144 (11th Cir. 2003).

17 Am. Jur. 2d Consumer Protection § 105

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection

Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

E. Consumer Leases

§ 105. Penalties and early termination fees

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 54

A.L.R. Library

Construction and application of Consumer Leasing Act (15 U.S.C.A. secs. 1667-1667e), 129 A.L.R. Fed. 587

A lease may specify penalties or other charges for a delinquency, default, or early termination.[1] However, these penalties may only be in at an amount that is reasonable in the light of the anticipated or actual harm, the difficulties of proof of loss, and the inconvenience or infeasibility of otherwise obtaining an adequate remedy.[2] As a general rule, the use of a disclosed actuarial method,[3] such as the "sum of digits method," is reasonable when determining the early termination penalty when the lessee experiences an insured total loss of the vehicle, but the lessor's use of an undisclosed actuarial method violates the Consumer Leasing Act.[4]

Unlike the disclosure provision,[5] the section of the Consumer Leasing Act on the reasonableness of penalties[6] does not include late payment penalties, so the Act does not regulate them.[7]

Lessees may not challenge the reasonableness of a termination fee until the lease is actually terminated, as until that time, the harm to the lessor cannot be determined.[8]

Footnotes

1 15 U.S.C.A. § 1667b(b).

2 15 U.S.C.A. § 1667b(b).

A lessor's application of an early termination clause in closed-end automobile lease was not a reasonable approximation of the anticipated or actual harm caused by the lessee's termination three months before the lease's conclusion where the resultant "penalty and charge" was $3,416.04 greater than the lessee would have paid had she made the final three lease payments. Mitchell v. Ford Motor Credit Co., 702 F. Supp. 2d 1356 (M.D. Fla. 2010).

3 §§ 102, 103.

4 Channell v. Citicorp Nat. Services, Inc., 89 F.3d 379 (7th Cir. 1996).

5 § 102.

6 15 U.S.C.A. § 1667b(b).

7 Deusner v. Firstar Corp., 186 F. Supp. 2d 766 (W.D. Ky. 2001).

8 Highsmith v. Chrysler Credit Corp., 18 F.3d 434, 129 A.L.R. Fed. 767 (7th Cir. 1994).

End of Document

17 Am. Jur. 2d Consumer Protection § 106

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

E. Consumer Leases

§ 106. Advertising

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 35

A.L.R. Library

Construction and application of Consumer Leasing Act (15 U.S.C.A. secs. 1667-1667e), 129 A.L.R. Fed. 587

An advertisement for a consumer lease, i.e., a commercial message in any medium that directly or indirectly promotes a consumer lease transaction,[1] must, if it states the amount of any payment or that any or no initial payment is required, also clearly and conspicuously[2] state, if applicable:[3]

(1) that the transaction is a lease;

(2) the total amount required at inception;

(3) that a security deposit is required;

(4) the number, amount, and time of payments; and

(5) that an extra charge may be imposed at the end of the lease term.

There are also guidelines for radio advertisements, which must include items (1) and (2), and essentially item (4); the total amount of payments; and a toll-free number or a reference to a print advertisement from which the potential consumer may obtain all of the information listed above.[4]

Owners and employees of the media have no liability for the content of the advertisement.[5]

Footnotes

1 12 C.F.R. § 1013.2(b).

2 15 U.S.C.A. § 1667c(a), implemented by 12 C.F.R. § 1013.7(b).

3 15 U.S.C.A. § 1667c(a).

4 15 U.S.C.A. § 1667c(c).

5 15 U.S.C.A. § 1667c(b).

17 Am. Jur. 2d Consumer Protection § 107

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection

Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

E. Consumer Leases

§ 107. Civil liability

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 61 to 68

A.L.R. Library

Construction and application of Consumer Leasing Act (15 U.S.C.A. secs. 1667-1667e), 129 A.L.R. Fed. 587

A lessor who fails to comply with any requirement imposed under the Consumer Leasing Act dealing with disclosures[1] and liability on termination[2] is liable to any person who is a beneficiary of those provisions as provided in the civil liability section[3] of the Truth in Lending Act.[4] Also, a lessor who fails to comply with any requirement imposed upon consumer lease advertising[5] with respect to any person who suffers actual damage from the violation is liable to that person.[6]

An action to impose civil liability may be brought in any United States District Court or in any other court of competent jurisdiction.[7] Such an action alleging a failure to disclose or otherwise comply with the consumer leasing requirements must be brought within one year of the termination of the lease agreement.[8]

Lessees who bring an action alleging violations of the Consumer Leasing Act may be subject to a counterclaim for the amount of the termination charge that remains due and owing if the method of calculating it is reasonable.[9]

Footnotes

1 15 U.S.C.A. § 1667a, discussed in §§ 102, 103.

2 15 U.S.C.A. § 1667b, discussed in §§ 104, 105.

3 15 U.S.C.A. § 1640, discussed in §§ 124 to 141.

4 15 U.S.C.A. § 1667d(a).

5 15 U.S.C.A. § 1667c, discussed in § 106.

6 15 U.S.C.A. § 1667d(b).

7 15 U.S.C.A. § 1667d(c).

8 15 U.S.C.A. § 1667d(c).
A lessor's repossession of the vehicle for nonpayment constituted termination of the lease; thus, the limitations period for the lessee's action challenging the calculation of early termination charges commenced at that time—not later, when the charges were assessed. Carmichael v. Nissan Motor Acceptance Corp., 291 F.3d 1278 (11th Cir. 2002).

9 Kedziora v. Citicorp Nat. Services, Inc., 883 F. Supp. 1155, 32 Fed. R. Serv. 3d 905 (N.D. Ill. 1995).

End of Document

17 Am. Jur. 2d Consumer Protection One I F Refs.

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection

Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 32, 33.1, 36, 60 to 68

A.L.R. Library

A.L.R. Index, Truth in Lending
West's A.L.R. Digest, Arbitration 3.3, 6.2
West's A.L.R. Digest, Consumer Credit 32, 33.1, 36, 60 to 68

End of Document

17 Am. Jur. 2d Consumer Protection § 108

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

1. In General

§ 108. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 33.1, 61.1 to 63

A.L.R. Library

Validity, Construction, and Application of Truth in Lending Act (TILA) and Regulations Promulgated Thereunder—United States Supreme Court Cases, 67 A.L.R. Fed. 2d 567

What constitutes violation of sec. 106(e) of Truth in Lending Act (15 U.S.C.A. sec. 1605(e)) relating to exemption of certain costs or fees from computation of finance charge in extensions of credit secured by interest in real property, 115 A.L.R. Fed. 453

Civil remedies of consumer for violations of credit transactions provisions of Truth in Lending Act (TILA) (15 U.S.C.A. secs. 1601 et seq.), as amended by Truth in Lending Simplification and Reform Act of 1982, 113 A.L.R. Fed. 173

Survivability of action brought under Truth in Lending Act (15 U.S.C.A. secs. 1601 et seq.), 53 A.L.R. Fed. 431

Trial Strategy

Violation of the Truth-In-Lending Act and Regulation Z. Violation of the Truth-In-Lending Act and Regulation Z, 73 Am. Jur. Proof of Facts 3d 275

Defense of Lender Liability Litigation, 44 Am. Jur. Trials 613

A number of remedies are afforded for noncompliance with the provisions of the Truth in Lending Act. While, except for the right to rescission, Regulation Z[1] is not concerned with enforcement and liability, the failure to follow the general disclosure requirements of the implementing regulation will trigger the civil penalties imposed by the Truth in Lending Act, no less than a failure to comply with the statute itself.[2]

A suit by a consumer cannot be based upon the Truth in Lending Act where the defendant is not a creditor, the transaction is not covered by the Act,[3] or the transaction is exempt from the Act's provisions.[4]

Footnotes

1 12 C.F.R. Pt. 1026.

2 Mourning v. Family Publications Service, Inc., 411 U.S. 356, 93 S. Ct. 1652, 36 L. Ed. 2d 318 (1973).

3 In re First Alliance Mortg. Co., 280 B.R. 246 (C.D. Cal. 2002) (CEO of mortgage company not the creditor); Cashback Catalog Sales, Inc. v. Price, 102 F. Supp. 2d 1375 (S.D. Ga. 2000); Joseph v. Norman's Health Club, Inc., 336 F. Supp. 307 (E.D. Mo. 1971); Ysasi v. Nucentrix Broadband Networks, Inc., 205 F. Supp. 2d 683 (S.D. Tex. 2002).

4 Garza v. Chicago Health Clubs, Inc., 329 F. Supp. 936 (N.D. Ill. 1971); Ysasi v. Nucentrix Broadband Networks, Inc., 205 F. Supp. 2d 683 (S.D. Tex. 2002) (exemption under Consumer Leasing Act).

17 Am. Jur. 2d Consumer Protection § 109

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

2. Administrative Enforcement

§ 109. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 64.1

The Truth in Lending Act makes extensive provision for the administrative enforcement of its provisions by designated instrumentalities.[1]

The authority of the Bureau of Consumer Financial Protection to issue regulations does not impair the authority of any other agency designated in the Act[2] to make rules respecting its own procedures to enforce compliance with the Act's requirements.[3] In the exercise of its functions, the Bureau of Consumer Financial Protection may obtain, upon request, the views of any other federal agency, which, in its judgment, exercises regulatory or supervisory functions with respect to any class of creditors subject to the Act.[4]

Footnotes

1 15 U.S.C.A. § 1607.
The statute does not allow a private person to bring an action to seek redress or injunctive relief. Ratner v. Chemical Bank New York Trust Co., 309 F. Supp. 983 (S.D. N.Y. 1969).

2 §§ 110, 111.

3 15 U.S.C.A. § 1607(d).

4 15 U.S.C.A. § 1608.

End of Document

17 Am. Jur. 2d Consumer Protection § 110

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
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Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

2. Administrative Enforcement

§ 110. Federal Trade Commission

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 32, 64.1

The Federal Trade Commission (FTC) has the overall power to enforce the requirements of the Truth in Lending Act[1] unless the power is specifically committed to some other governmental agency.[2] A violation of any requirement imposed under the Truth in Lending Act is deemed a violation of a requirement imposed under the Federal Trade Commission Act.[3] All of the FTC's functions and powers under the Federal Trade Commission Act are available to enforce compliance with the requirements imposed by the Truth in Lending Act, irrespective of whether the targeted person is engaged in commerce or meets any other jurisdictional test in the Federal Trade Commission Act.[4]

Footnotes

1 15 U.S.C.A. § 1607(c), providing that such power is subject to 12 U.S.C.A. §§ 5511 et seq., dealing with the general powers of the Bureau of Consumer Financial Protection.
The Truth in Lending Act establishes minimum standards of disclosure, which the Federal Trade Commission may enforce without proving unfairness or deception on a case-by-case basis. Tashof v. F.T.C., 437 F.2d 707 (D.C. Cir. 1970).

2 § 111.

3 15 U.S.C.A. § 1607(c).

4 15 U.S.C.A. § 1607(c).

As to the FTC's enforcement powers, generally, see Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 1168 to 1219.

End of Document

17 Am. Jur. 2d Consumer Protection § 111

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

2. Administrative Enforcement

§ 111. Other agencies

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 32, 64.1

The requirements of the Truth in Lending Act are enforced by specified federal officers and agencies under their respective enabling acts.[1] A violation of any requirement imposed under the Truth in Lending Act is deemed to be a violation of a requirement imposed under those acts.[2] In addition, those agencies may exercise, for the purpose of enforcing compliance, any other authority conferred on them by law.[3]

The enforcing instrumentalities named in the statute are:

- the Comptroller of the Currency, with respect to national banks, federal savings associations, and federal branches and federal agencies of foreign banks[4]
- the Board of Governors of the Federal Reserve System, in the case of member banks of the Federal Reserve System (other than national banks); branches and agencies of foreign banks (other than federal branches, federal agencies, and insured state branches of foreign banks); commercial lending companies owned or controlled by foreign banks; and organizations operating under provisions of the Federal Reserve Act[5] pertaining to the establishment by national banks of foreign branches and investments in banks doing foreign business and the organization of corporations to do foreign banking[6]
- the Federal Deposit Insurance Corporation (FDIC), with respect to banks and state savings associations insured by the FDIC (other than members of the Federal Reserve System), and insured state branches of foreign banks[7]

• the Director of the National Credit Union Administration, with respect to any federal credit union[8]

• the Secretary of Transportation with respect to certain air carriers and foreign air carriers[9]

• the Secretary of Agriculture, with respect to activities subject to the Packers and Stockyards Act of 1921[10]

• the Farm Credit Administration, with respect to any federal land bank, federal land bank association, federal intermediate credit bank, or production credit association[11]

• the Bureau of Consumer Financial Protection, with respect to any person subject to the Truth in Lending Act[12]

• the Securities and Exchange Commission, with respect to a broker or dealer, other than a depository institution[13]

Footnotes

1 15 U.S.C.A. § 1607(a).

2 15 U.S.C.A. § 1607(b).

3 15 U.S.C.A. § 1607(b).

4 15 U.S.C.A. § 1607(a)(1)(A), incorporating 12 U.S.C.A. § 1813(q)(1) by reference.
As to the authority of the various federal agencies regulating banking, see Am. Jur. 2d, Banks and Financial Institutions §§ 24 to 101.70.

5 12 U.S.C.A. §§ 601 et seq., 611 et seq.

6 15 U.S.C.A. § 1607(a)(1)(B), incorporating 12 U.S.C.A. § 1813(q)(3) by reference.

7 15 U.S.C.A. § 1607(a)(1)(C) incorporating 12 U.S.C.A. § 1813(q)(2) by reference.
However, 12 U.S.C.A. § 1818 does not authorize the Federal Deposit Insurance Corporation to order reimbursement as a remedy for various Truth in Lending Act violations. Citizens State Bank of Marshfield, Mo. v. Federal Deposit Ins. Corp., 751 F.2d 209 (8th Cir. 1984).

8 15 U.S.C.A. § 1607(a)(2).

9 15 U.S.C.A. § 1607(a)(3).

10 15 U.S.C.A. § 1607(a)(4).

11 15 U.S.C.A. § 1607(a)(5).

12 15 U.S.C.A. § 1607(a)(6).

13 15 U.S.C.A. § 1607(a)(7).

End of Document

17 Am. Jur. 2d Consumer Protection § 112

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection

Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

2. Administrative Enforcement

§ 112. Authority to require restitution

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 64.1

Where an annual percentage rate or finance charge was inaccurately disclosed, the enforcing agency is required to notify the creditor of the disclosure error and is authorized to require that the creditor make an adjustment to the account of the person to whom credit was extended to assure that the person will not be required to pay a finance charge in excess of that actually disclosed or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower.[1] Except for disclosure errors resulting from a willful violation intended to mislead, specified tolerances apply in determining whether a disclosure error has occurred.[2] The enforcing agency will require an adjustment when it determines that the error resulted from a clear and consistent pattern or practice of violations, gross negligence or a willful violation intended to mislead the person to whom credit was extended[3] but with the proviso that, except with regard to a willful violation, the agency need not require an adjustment if it makes specified determinations.[4]

Other limitations are imposed upon the authority to order an adjustment.[5] One of these limitations, in the case of institutions subject to examination by the banking authorities,[6] is that adjustments are required only for transactions occurring after the immediately preceding examination except where the practices giving rise to violations identified in earlier examinations have not been corrected.[7] Thus, a bank's liability is limited to the most recent preceding examination even if the last examination was not for compliance with the Truth in Lending Act.[8]

An adjustment may be required by an enforcing agency only by an order issued in accordance with cease and desist procedures[9] or by an order after a hearing on notice.[10] Under specified circumstances, a creditor is not subject to an order to make an adjustment if, within 60 days after discovering a disclosure error, it notifies the person concerned of the error and adjusts the account.[11]

Footnotes

1 15 U.S.C.A. § 1607(e)(1).

2 15 U.S.C.A. § 1607(e)(1).

3 15 U.S.C.A. § 1607(e)(2).

4 15 U.S.C.A. § 1607(e)(2)(A) to 15 U.S.C.A. § 1607(e)(2)(D).

5 15 U.S.C.A. § 1607(e)(3).

6 § 111.

7 15 U.S.C.A. § 1607(e)(3)(C)(i).

8 First Nat. Bank of Council Bluffs, Iowa v. Office of Comptroller of Currency, 956 F.2d 1456 (8th Cir. 1992); Consolidated Bank, N.A., Hialeah, Florida v. U.S. Dept. of Treasury, Office of Comptroller of Currency, 118 F.3d 1461 (11th Cir. 1997).

9 15 U.S.C.A. § 1607(e)(4)(A).

10 15 U.S.C.A. § 1607(e)(4)(B).

11 15 U.S.C.A. § 1607(e)(6).

End of Document

17 Am. Jur. 2d Consumer Protection § 113

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

3. Right of Rescission

§ 113. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 36, 60, 66

A.L.R. Library

Civil remedies of consumer for violations of credit transactions provisions of Truth in Lending Act (TILA) (15 U.S.C.A. secs. 1601 et seq.), as amended by Truth in Lending Simplification and Reform Act of 1982, 113 A.L.R. Fed. 173
Obligations of the parties under sec. 125(b) of Truth in Lending Act (15 U.S.C.A. sec. 1635(b)) upon rescission of credit transaction involving real estate, 61 A.L.R. Fed. 839

Forms

Forms relating to rescission of credit transaction, generally, see Am. Jur. Pleading and Practice Forms—Truth in Lending and Consumer Credit Protection; Federal Procedural Forms (L.Ed.)—Consumer Credit Protection [Westlaw® Search Query]

In the case of any consumer credit transaction (including opening or increasing the credit limit for an open-end credit plan)[1] in which a security interest (including any security interest arising by operation of law) is or will be retained or acquired in any property, which is used as the principal dwelling of the person to whom credit is extended, the obligor has the right to rescind the transaction by notifying the creditor[2] of his or her intention to do so.[3] However, the security interest does not become automatically void upon the obligor giving notice of his or her intent to rescind since the lender may contest the obligor's right to rescind and present evidence that it did not violate the Truth in Lending Act.[4] The reason for this result is that had the lender acquiesced in the notice of rescission, the transaction would have been rescinded automatically, but if the lender contests the borrower's right to rescind, rescission occurs only when the court determines the issue in the borrower's favor.[5] Thus, the word "rescission" is used in its legal sense—not to signify an annulment accomplished by the borrower's unilateral pronouncement but as a remedy restoring the status quo.[6] Because a notice of intent to rescind does not automatically effect a rescission, it does not preclude the lender from invoking an arbitration clause.[7]

Practice Tip:

An action to rescind a consumer credit transaction under the Truth in Lending Act may be brought in federal court.[8] The action for rescission survives in favor of the administrator of the estate of a deceased plaintiff,[9] but since it is personal to the obligor, a class action is not available.[10]

Rescission rights are triggered only as a result of a material disclosure violation.[11] On the other hand, a court may not judicially carve out an equitable exception to the right of rescission on the ground that, if a mistake occurred, it was made in good faith and was purely technical notwithstanding that rescission is an equitable remedy.[12] A lender's technical violation of the statute, consisting of a failure to state the expiration date of the right to rescind as required, entitles the borrowers to rescind even though they were not in need of protection.[13]

Notwithstanding any rule of evidence, a written acknowledgment of the receipt of disclosures required under the Truth in Lending Act, by a person to whom the information and rescission notice must be given, does no more than create a rebuttable presumption of their delivery.[14] This presumption imposes on the borrower the burden of going forward with evidence to rebut it but does not shift the ultimate burden of proof.[15]

Footnotes

1 As to open-end credit transactions, see §§ 31 to 60.

2 § 115.

3 15 U.S.C.A. § 1635(a).
The implementing regulations are found in 12 C.F.R. §§ 1026.15, 1026.23.
As to an exemption for residential mortgages, see § 116.

4 Yamamoto v. Bank of New York, 329 F.3d 1167 (9th Cir. 2003).

5 Yamamoto v. Bank of New York, 329 F.3d 1167 (9th Cir. 2003).

6 Ray v. Citifinancial, Inc., 228 F. Supp. 2d 664 (D. Md. 2002) (D. Md. 2002).

7 Large v. Conseco Finance Servicing Corp., 292 F.3d 49 (1st Cir. 2002).

8 Sosa v. Fite, 465 F.2d 1227 (5th Cir. 1972).

9 § 119.

10 James v. Home Const. Co., Inc., 458 F. Supp. 54 (S.D. Ala. 1978), judgment rev'd on other grounds, 621 F.2d 727 (5th Cir. 1980); Gibbons v. Interbank Funding Group, 208 F.R.D. 278 (N.D. Cal. 2002) (commonality requirement not met); Mayo v. Sears, Roebuck & Co., 148 F.R.D. 576 (S.D. Ohio 1993).

11 Malfa v. Household Bank, F.S.B., 825 F. Supp. 1018 (S.D. Fla. 1993), aff'd, 50 F.3d 1037 (11th Cir. 1995) (rescission was not warranted where the lender failed to include in the disclosure statement an itemization of taxes and fees but did itemize those fees in the settlement statement as this failure was not a material nondisclosure).

A failure to disclose recording fees was a material nondisclosure, entitling the mortgagors to rescind, even though the fees seemed minuscule compared to the amount of the loan. Cheshire Mortg. Service, Inc. v. Montes, 223 Conn. 80, 612 A.2d 1130 (1992).

12 Arnold v. W.D.L. Investments, Inc., 703 F.2d 848 (5th Cir. 1983).

13 Semar v. Platte Valley Federal Sav. & Loan Ass'n, 791 F.2d 699 (9th Cir. 1986).

14 15 U.S.C.A. § 1635(c).

15 Williams v. First Government Mortg. and Investors Corp., 225 F.3d 738 (D.C. Cir. 2000) (due to inconsistencies in testimony, borrower did not rebut presumption).

End of Document

17 Am. Jur. 2d Consumer Protection § 114

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection

Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

3. Right of Rescission

§ 114. Notice of rescission rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 36, 60

Forms

Forms relating to rescission of credit transaction, generally, see Am. Jur. Pleading and Practice Forms—Truth in Lending and Consumer Credit Protection; Federal Procedural Forms (L.Ed.)—Consumer Credit Protection [Westlaw® Search Query]

A creditor must clearly and conspicuously disclose, in accordance with the regulations, to any obligor in a transaction subject to rescission under the Truth in Lending Act the obligor's rights under the statute and must also provide, in accordance with regulations, appropriate forms for the obligor to exercise his or her right to rescind.[1]

The notice of the consumer's right to rescind must not be contradicted by any confusing or misleading provision,[2] and inaccurate notices are ineffective.[3] Where more than one reading of a rescission form is plausible, the form does not provide the borrower with a clear notice of what his or her right to rescind entails.[4] However, no right to rescind arises solely from the form of written notice used by the creditor to inform the obligor of his or her rights, if the form was published and adopted by the Bureau of Consumer Financial Protection or was a comparable form, properly completed by the creditor and otherwise complying with all other requirements regarding notice.[5] Including, with the notice, a certificate to be signed at the end of the three-day period,

confirming that the borrowers had not exercised their right to rescind, is not misleading.[6] Moreover, leaving some spaces on the form blank does not invalidate the notice if a reasonable person reading the form as completed would have understood it as to the final date for rescission and the length of the period to rescind.[7]

Since the obligee has three days from the rescission notice to give notice of his or her intent to rescind,[8] a financing agreement stating that the right to rescind the contract expires on a date before the parties executed it, rather than three days after its execution, violates the Act.[9] A premature notice of the right to rescind, given before the lender is obligated to disburse the loan, is also ineffective.[10]

Footnotes

1 15 U.S.C.A. § 1635(a), implemented by 12 C.F.R. §§ 1026.15(b), 1026.23(b).

2 Mount v. LaSalle Bank Lake View, 926 F. Supp. 759 (N.D. Ill. 1996).

3 Powers v. Sims and Levin, 542 F.2d 1216 (4th Cir. 1976) (rejected on other grounds by, Tarplain v. Baker Ford, Inc., 466 F. Supp. 1340 (D.R.I. 1979)); Doggett v. County Savings & Loan Co., 373 F. Supp. 774 (E.D. Tenn. 1973).

4 Handy v. Anchor Mortg. Corp., 464 F.3d 760 (7th Cir. 2006).

5 15 U.S.C.A. § 1635(h).

6 Smith v. Highland Bank, 108 F.3d 1325 (11th Cir. 1997).

7 Melfi v. WMC Mortgage Corp., 568 F.3d 309 (1st Cir. 2009).

8 § 115.

9 Basnight v. Diamond Developers, Inc., 146 F. Supp. 2d 754 (M.D. N.C. 2001).

10 In re Vickers, 275 B.R. 401 (Bankr. M.D. Fla. 2001).

17 Am. Jur. 2d Consumer Protection § 115

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

3. Right of Rescission

§ 115. Notice of intent to rescind

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 36, 60

Forms

Forms relating to rescission of credit transaction, generally, see Am. Jur. Pleading and Practice Forms—Truth in Lending and Consumer Credit Protection; Federal Procedural Forms (L.Ed.)—Consumer Credit Protection [Westlaw® Search Query]

The giving of notice is a necessary predicate act to the ultimate exercise of the right of rescission under the Truth in Lending Act.[1] An obligor in a consumer credit transaction has until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required by the statute[2] together with a statement containing the material disclosures required by the Truth in Lending Act, whichever is later, to notify the creditor of his or her intention to rescind.[3] This requirement is construed liberally in the consumer's favor.[4]

The filing of a complaint constitutes statutory notice of rescission pursuant to the Truth in Lending Act.[5]

Caution:

The mere timely giving of notice is not enough to effectuate a rescission. When a borrower gives written notice before the three-year time bar[6] lapses and the creditor does not respond, the borrower must then file his or her own action for rescission within the three years.[7]

CUMULATIVE SUPPLEMENT

Cases:

Under the Truth in Lending Act (TILA), giving notice of rescission does not void the loan or cause the lender to ipso facto forfeit its loan; it only requires that the loan be unwound. Truth in Lending Act, § 102 et seq., 15 U.S.C.A. § 1601 et seq. In re Brown, 538 B.R. 714 (Bankr. E.D. Va. 2015).

[END OF SUPPLEMENT]

Footnotes

1 Hartman v. Smith, 734 F.3d 752 (8th Cir. 2013).

2 § 114.

3 15 U.S.C.A. § 1635(a).

4 Arnold v. W.D.L. Investments, Inc., 703 F.2d 848 (5th Cir. 1983).

5 McKenna v. First Horizon Home Loan Corp., 429 F. Supp. 2d 291 (D. Mass. 2006), decision rev'd on other grounds, 475 F.3d 418 (1st Cir. 2007).

6 § 118.

7 Rosenfield v. HSBC Bank, USA, 681 F.3d 1172 (10th Cir. 2012).

17 Am. Jur. 2d Consumer Protection § 116

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

3. Right of Rescission

§ 116. Exempt transactions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 36, 60

Forms

Forms relating to rescission of credit transaction, generally, see Am. Jur. Pleading and Practice Forms—Truth in Lending and Consumer Credit Protection; Federal Procedural Forms (L.Ed.)—Consumer Credit Protection [Westlaw® Search Query]

The rescission provision of the Truth in Lending Act does not apply to a residential mortgage transaction.[1] Thus, in the case of a purchase-money mortgage, the mortgage lender is not required by the Truth in Lending Act to advise the debtor of the right to rescind.[2] The right to rescind is also not available where the transaction is structured as a sale of a residence rather than as a loan and is evidenced by a warranty deed absolute on its face with an option to repurchase, and the purchaser is not a creditor.[3] The right to rescind a mortgage loan does exist, however, if the property itself was not the security for the loan obtained to purchase the property.[4] Moreover, there is a right to rescind on the foreclosure of a security interest on the primary dwelling of an obligor securing an extension of credit if a mortgage broker fee is not included in the finance charge, or an appropriate form of notice of rescission for the transaction was not provided.[5]

The right to rescind also does not apply to:

- a transaction that constitutes a refinancing or consolidation (with no new advances) by the same creditor secured by an interest in the same property[6]

- a transaction in which an agency of a state is the creditor[7]

- advances under a preexisting, open-end credit plan, if a security interest has already been retained or acquired, and the advances are in accordance with a previously established credit limit for the plan[8]

Footnotes

1 15 U.S.C.A. § 1635(e)(1).
A "residential mortgage transaction" is defined in 15 U.S.C.A. § 1602(x) as a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of the dwelling. "Dwelling" is also defined in 15 U.S.C.A. § 1602(w).

2 In re Tomasevic, 275 B.R. 86 (Bankr. M.D. Fla. 2001).

3 Redic v. Gary H. Watts Realty Co., 762 F.2d 1181 (4th Cir. 1985).

4 Weingartner v. Chase Home Finance, LLC, 702 F. Supp. 2d 1276 (D. Nev. 2010).

5 15 U.S.C.A. § 1635(i) (further excusing de minimis violations and allowing for recoupment).

6 15 U.S.C.A. § 1635(e)(2).
A loan transaction in which the lender advanced an amount sufficient to pay off its previous mortgage loan, together with additional money, qualified as a "refinancing," and the borrower had only a limited right of rescission. In re Porter, 961 F.2d 1066 (3d Cir. 1992).
The exemption for refinancing transactions is grounded in the rationale that although general consumer borrowers need a cooling off period to reconsider encumbering the title to their homes, a borrower who refinances has already had the time to rethink with respect to the old money. Cheche v. Wittstat Title & Escrow Co., LLC, 723 F. Supp. 2d 851 (E.D. Va. 2010).
Restructuring and modification agreements with same creditor were exempt from rescission under Regulation Z of Truth in Lending Act as a refinancing or consolidation of an extension of credit already secured by the consumer's principal dwelling. Scott v. Wells Fargo Home Mortg. Inc., 326 F. Supp. 2d 709 (E.D. Va. 2003), aff'd, 67 Fed. Appx. 238 (4th Cir. 2003).

7 15 U.S.C.A. § 1635(e)(3).

8 15 U.S.C.A. § 1635(e)(4).

End of Document

17 Am. Jur. 2d Consumer Protection § 117

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

3. Right of Rescission

§ 117. Effect of creditor's waiver of security interest

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 36, 60

Forms

Forms relating to rescission of credit transaction, generally, see Am. Jur. Pleading and Practice Forms—Truth in Lending and Consumer Credit Protection; Federal Procedural Forms (L.Ed.)—Consumer Credit Protection [Westlaw® Search Query]

Since the right of the obligor in a consumer credit transaction to rescind arises where the creditor retains or acquires a security interest in the debtor's principal dwelling,[1] a creditor is not required to furnish the purchaser with notice of the right to rescind where the retail installment agreement provides that if the merchandise becomes real property, the seller waives its security interest.[2]

Footnotes

1 15 U.S.C.A. § 1635(a).

2 Turoff v. May Co., 531 F.2d 1357, 21 Fed. R. Serv. 2d 503 (6th Cir. 1976).

End of Document

17 Am. Jur. 2d Consumer Protection § 118

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection

Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

3. Right of Rescission

§ 118. Time limit on right to rescind

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 60

A.L.R. Library

Validity, Construction, and Application of Truth in Lending Act (TILA) and Regulations Promulgated Thereunder—United States Supreme Court Cases, 67 A.L.R. Fed. 2d 567

An obligor's right of rescission expires three years after the date of the consummation of the transaction or upon the sale of property, whichever occurs first, notwithstanding the fact that the information and forms required under the rescission statute[1] or any other disclosures required under the Truth in Lending Act (TILA) have not been delivered to the obligor.[2] Thus, the right of rescission is extended from three days to a maximum[3] of three years where the lender fails to provide appropriate notice of that right.[4] In fact, there are two categories of trigger events which extend the time to rescind a transaction: (1) failure to provide each consumer with an interest in the property with one copy of the TILA disclosure form with all material information correctly disclosed, and (2) failure to give each consumer two copies of the notice of the right to cancel, one copy to keep and one to use if the option to rescind is exercised.[5]

The statute does not merely limit the time period in which the right to rescission may be asserted but limits the existence of the right itself to three years;[6] thus, the right may not be revived by asserting it as a defense in recoupment.[7] The running of the statute also deprives a court of subject matter jurisdiction to order rescission.[8] However, the commencement of a court action prior to the expiration of the three-year period is sufficient to constitute the notice of rescission even though the borrowers did not mail a copy of their court papers to the lender until some time later.[9]

The statute of limitations in the civil liability provision of the Act[10] does not apply to an action to enforce the right of rescission.[11] The fact that a consumer is barred by the one-year statute of limitations from suing for damages does not bar an action for rescission[12] but may bar claims for damages arising from the underlying violation.[13]

If any agency empowered to enforce the provisions of the Truth in Lending Act[14] institutes a proceeding to enforce the provisions of the rescission statute within three years after the date of the consummation of the transaction, the borrower's time to rescind is extended to the expiration of one year following the conclusion of the proceeding or any judicial review or period for judicial review if that is later than the deadline noted above.[15]

The right to rescind after the initiation of foreclosure proceedings on the obligor's primary dwelling is subject to the time limits stated above.[16]

A district court has subject matter jurisdiction to determine whether a mortgagor sold mortgaged property before claiming a right to rescission as would render the right to rescission expired under the TILA's statute of repose.[17]

CUMULATIVE SUPPLEMENT

Cases:

Borrower was entitled to amend her pro se complaint against lender to allege a right to rescind under the Truth in Lending Act (TILA), conditioned on her delivery to the district court of a copy of the rescission letter that she purportedly sent to lender within three years of her loan refinancing, where, after the district court dismissed borrower's TILA allegation for failure to state a claim, the Supreme Court decided, in *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S.Ct. 790, that TILA gives a borrower the right to rescind certain loans, and that this right may be exercised by a written notice from the borrower to the lender within three years after consummation of the transaction. Truth in Lending Act § 125, 15 U.S.C.A. § 1635(f). Oskoui v. J.P. Morgan Chase Bank, N.A., 851 F.3d 851 (9th Cir. 2017).

TILA's three-year statutory limit on rescission, triggered by consummation of the transaction, applies even though there is no requirement to file suit within that period. Truth in Lending Act § 125, 15 U.S.C.A. § 1635. In re Jensen-Edwards, 535 B.R. 336 (Bankr. D. Idaho 2015).

Even assuming that right of rescission under the Truth in Lending Act (TILA) could be exercised by Chapter 13 debtors to rescind residential mortgage loan that they obtained to purchase mortgage property in question, any such right of rescission had to be exercised, at the very latest, within three years of purchase-money mortgage transaction, even if mortgage lender totally failed to ever make requisite TILA disclosures, and could not be pursued by debtors nearly ten years after that absolute three-year deadline expired. Truth in Lending Act § 125(a, f), 15 U.S.C.A. § 1635(a, f). In re Albanes, 560 B.R. 155 (Bankr. D. N.J. 2016).

Fact that borrower did not file lawsuit within three-year period under TILA to rescind loan transaction pertaining to principle dwelling did not render borrower's rescission notice untimely, since borrower's notice occurred within three-year period, and borrower was permitted to rescind loan transaction under TILA without filling lawsuit. Truth in Lending Act §§ 125, 125, 125,

15 U.S.C.A. §§ 1635(a), 1635(b), 1635(f); 12 C.F.R. §§ 226.33(b), 1026.23(a)(3)(i). U.S. Bank National Association v. Naifeh, 2016 WL 3944575 (Cal. App. 1st Dist. 2016).

When a lender fails to comply with its obligations to return money or property following rescission, and the borrower timely sues to enforce his rescission rights, those rights are not subject to loss at a subsequent date by reason of the passage of three years or by reason of a sale of the property; if a sale of the property subsequent to the exercise of the right to rescind served to extinguish the right, a consumer would lose the right to damages based on the creditor's failure to rescind when it was legally required to do so. Truth in Lending Act, § 125(b), 15 U.S.C.A. § 1635(b). Financial Freedom Acquisition, LLC v. Standard Bank and Trust Co., 2015 IL 117950, 398 Ill. Dec. 1, 43 N.E.3d 911 (Ill. 2015).

Fact that assignee substituted in as plaintiff in foreclosure action, allowed mortgagor to refinance, and then dismissed foreclosure action did not render moot mortgagor's counterclaim against original mortgagee for rescission under the Truth in Lending Act (TILA); if mortgagor's rescission claim was timely, mortgagee would be required to return certain monies even if it could no longer release a security interest on the subject property. Truth in Lending Act § 125, 15 U.S.C.A. § 1635(b). GreenPoint Mortgage Funding, Inc. v. Hirt, 2018 IL App (1st) 170921, 420 Ill. Dec. 492, 97 N.E.3d 66 (App. Ct. 1st Dist. 2018).

[END OF SUPPLEMENT]

Footnotes

1 § 114.

2 15 U.S.C.A. § 1635(f).
A borrower has the right to rescind a loan transaction due to the lender's violations of the Truth in Lending Act, even though she purported to waive that right in restructuring the loan, since the borrower may exercise this right within three years of the consummation of the transaction and did not waive the right at restructuring as she was never told at that time of her unequivocal right to rescind. Mills v. Home Equity Group, Inc., 871 F. Supp. 1482 (D.D.C. 1994).
A lender failed to make material disclosures, entitling the borrowers to three years to rescind the installment contract, where the disclosures in the customers' copy of the contract were illegible, and although the lender mailed a letter to the customers which clearly made several required disclosures, the letter did not state the finance charge or when payments were to begin. Rowland v. Magna Millikin Bank of Decatur, N.A., 812 F. Supp. 875 (C.D. Ill. 1992).

3 R.G. Financial Corp. v. Vergara-Nunez, 446 F.3d 178 (1st Cir. 2006) (an earlier foreclosure judgment precluded the mortgagor's later assertion of a right of rescission; procedural or substantive requirements may end the right of rescission even earlier than the three-year maximum).
A foreclosure sale terminated a borrower/grantor's right of rescission of a deed of trust under the Truth in Lending Act. Hallas v. Ameriquest Mortg. Co., 406 F. Supp. 2d 1176 (D. Or. 2005), aff'd, 280 Fed. Appx. 667 (9th Cir. 2008).

4 Cooper v. First Government Mortg. and Investors Corp., 238 F. Supp. 2d 50 (D.D.C. 2002) (question of fact on issue presented); In re Rodrigues, 278 B.R. 683 (Bankr. D. R.I. 2002).

5 In re Regan, 439 B.R. 522 (Bankr. D. Kan. 2010).

6 Beach v. Ocwen Federal Bank, 523 U.S. 410, 118 S. Ct. 1408, 140 L. Ed. 2d 566 (1998); Carthan-Ragland v. Standard Bank and Trust Co., 897 F. Supp. 2d 706 (N.D. Ill. 2012).

7 Beach v. Ocwen Federal Bank, 523 U.S. 410, 118 S. Ct. 1408, 140 L. Ed. 2d 566 (1998).

8 Miguel v. Country Funding Corp., 309 F.3d 1161 (9th Cir. 2002), as amended on denial of reh'g, (Dec. 23, 2002) (where lender did not receive the notice within three years even though its servicing agent did).

9 Taylor v. Domestic Remodeling, Inc., 97 F.3d 96 (5th Cir. 1996).

10 15 U.S.C.A. § 1640(e), discussed in § 129.

11 Littlefield v. Walt Flanagan & Co., 498 F.2d 1133 (10th Cir. 1974).

12 Mount v. LaSalle Bank Lake View, 886 F. Supp. 650 (N.D. Ill. 1995); Burley v. Bastrop Loan Co., Inc., 407 F. Supp. 773 (W.D. La. 1975), judgment rev'd on other grounds, 590 F.2d 160 (5th Cir. 1979).

13 Mount v. LaSalle Bank Lake View, 886 F. Supp. 650 (N.D. Ill. 1995).

14 §§ 110, 111.

15 15 U.S.C.A. § 1635(f).

16 15 U.S.C.A. § 1635(i).

A mortgage lender did not initiate foreclosure proceedings against a borrower, within the meaning of the Truth in Lending Act, when the lender sent the borrower a warning letter notifying him that it intended to begin legal action against him, as required by Pennsylvania law, where the lender did not follow through on its warning and actually begin foreclosure. McCutcheon v. America's Servicing Co., 560 F.3d 143 (3d Cir. 2009).

17 Doss v. Clearwater Title Co., 551 F.3d 634 (7th Cir. 2008).

End of Document

17 Am. Jur. 2d Consumer Protection § 119

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection

Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

3. Right of Rescission

§ 119. Who may exercise right

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 60

A.L.R. Library

Survivability of action brought under Truth in Lending Act (15 U.S.C.A. secs. 1601 et seq.), 53 A.L.R. Fed. 431

Provided that he or she meets other statutory requirements, the "obligor" in a consumer credit transaction is afforded the right to rescind.[1] The right to rescind survives in favor of the administrator of the estate of a deceased obligor.[2] However, an obligor in a credit transaction does not obtain the right to rescind if the transaction is not a consumer credit transaction of the type covered by the Truth in Lending Act.[3]

Footnotes

1 15 U.S.C.A. § 1635(a).

2 James v. Home Const. Co. of Mobile, Inc., 621 F.2d 727 (5th Cir. 1980).

3 Tower v. Home Const. Co. of Mobile, Inc., 458 F. Supp. 112 (S.D. Ala. 1978).

End of Document

17 Am. Jur. 2d Consumer Protection § 120

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection

Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

3. Right of Rescission

§ 120. Who may exercise right—Waiver or modification of rescission rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 60

Forms

Forms relating to rescission of credit transaction, generally, see Am. Jur. Pleading and Practice Forms—Truth in Lending and Consumer Credit Protection; Federal Procedural Forms (L.Ed.)—Consumer Credit Protection [Westlaw® Search Query]

The Bureau of Consumer Financial Protection is authorized to prescribe regulations permitting the modification or waiver of rescission rights to permit owners to meet bona fide personal financial emergencies.[1] The implementing regulations provide for waivers when the extension of credit is needed to meet a personal financial emergency, including a natural disaster.[2]

Footnotes

1 15 U.S.C.A. § 1635(d).

2 12 C.F.R. §§ 1026.15(e), 1026.23(e).

End of Document

17 Am. Jur. 2d Consumer Protection § 121

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection

Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

3. Right of Rescission

§ 121. Rights against assignees

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 36, 60

A.L.R. Library

Civil remedies of consumer for violations of credit transactions provisions of Truth in Lending Act (TILA) (15 U.S.C.A. secs. 1601 et seq.), as amended by Truth in Lending Simplification and Reform Act of 1982, 113 A.L.R. Fed. 173

A consumer who has the right to rescind may rescind the transaction as against any assignee of the obligation.[1] Thus, borrowers have an absolute right against an assignee to rescind if they establish the predicate claim for rescission on the basis of a material failure to disclose.[2] In fact, under the Truth in Lending Act, any remedy of rescission a plaintiff may have must be invoked against the current holder of the mortgage loan.[3] The holder-in-due-course doctrine is not a defense to a rescission claim,[4] and a provision of a purchase and assumption agreement expressly stating that the lender's successor in interest does not assume the lender's liability for borrower claims does not preclude the borrower's rescission claim against the successor in interest.[5]

Footnotes

1 15 U.S.C.A. § 1641(c).

2 Mount v. LaSalle Bank Lake View, 926 F. Supp. 759 (N.D. Ill. 1996).

3 Long v. JP Morgan Chase Bank, Nat. Ass'n, 848 F. Supp. 2d 1166 (D. Haw. 2012).

4 Stone v. Mehlberg, 728 F. Supp. 1341 (W.D. Mich. 1989); Thomas v. Leja, 187 Mich. App. 418, 468 N.W.2d 58 (1991).

5 Fernandes v. JPMorgan Chase Bank, N.A., 818 F. Supp. 2d 1086 (N.D. Ill. 2011).

End of Document

17 Am. Jur. 2d Consumer Protection § 122

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection

Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

3. Right of Rescission

§ 122. Effect of rescission

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 60

A.L.R. Library

Obligations of the parties under sec. 125(b) of Truth in Lending Act (15 U.S.C.A. sec. 1635(b)) upon rescission of credit transaction involving real estate, 61 A.L.R. Fed. 839

Forms

Forms relating to rescission of credit transaction, generally, see Am. Jur. Pleading and Practice Forms—Truth in Lending and Consumer Credit Protection; Federal Procedural Forms (L.Ed.)—Consumer Credit Protection [Westlaw® Search Query]

Upon rescission, the obligor is not liable for any finance or other charge, and any security interest given by the obligor, including any security interest arising by operation of law, becomes void.[1] Thus, a court may not condition relief on the borrower repaying interest.[2]

Within 20 days after receipt of a notice of rescission, the creditor must return to the obligor any money or property given as earnest money, a down payment, or otherwise and must take any action needed to terminate any security interest created under the transaction.[3]

The obligor may retain possession of any property delivered by the creditor; however, upon the performance of the creditor's obligations, the obligor must tender the property to the creditor except that if the return of the property in kind would be impracticable or inequitable, the obligor must tender its reasonable value.[4] Rescission may be conditioned on returning to the creditor what is legally due[5]—the principal amount of the loan[6] or any property received in connection with the transaction[7] or the property's reasonable value.[8] Thus, before ordering rescission, a court may require that the borrowers provide proof of their ability to repay the loan proceeds, less interest and finance charges.[9] However, a bankruptcy court has discretion[10] and may consider the interests of other creditors when determining whether rescission must be conditioned on paying the full, remaining principal balance.[11]

Tender may be made at the location of the property or at the residence of the obligor at the obligor's option.[12] If the creditor does not take possession of the property within 20 days after the tender, ownership vests in the obligor without any obligation to pay for it.[13]

Because of the sequence of acts stated in the statute, the debtor is generally not required to tender first; instead, the creditor must tender before the borrower's obligation arises.[14] However, it has also been held that the courts have the discretion to devise other procedures, including conditioning rescission on the debtor's prior return of the principal amount of the loan,[15] and the lender's failure to first tender does not necessarily relieve the borrower of his or her obligation to tender, at least where no evidence is presented of any attempt to cheat or deceive the borrower.[16]

Footnotes

1 15 U.S.C.A. § 1635(b).

2 Semar v. Platte Valley Federal Sav. & Loan Ass'n, 791 F.2d 699 (9th Cir. 1986); In re Quenzer, 274 B.R. 899 (Bankr. D. Kan. 2001), decision rev'd on other grounds, 288 B.R. 884 (D. Kan. 2003) (even though some time passed before borrowers exercised right to rescind).

3 15 U.S.C.A. § 1635(b).

4 15 U.S.C.A. § 1635(b).
The borrowers must pay the reasonable value of windows installed in their home, as a condition of rescission, even though their debts had previously been discharged in bankruptcy. Rowland v. Magna Millikin Bank of Decatur, N.A., 812 F. Supp. 875 (C.D. Ill. 1992).

5 Powers v. Sims and Levin, 542 F.2d 1216 (4th Cir. 1976) (rejected on other grounds by, Tarplain v. Baker Ford, Inc., 466 F. Supp. 1340 (D.R.I. 1979)); Ray v. Citifinancial, Inc., 228 F. Supp. 2d 664 (D. Md. 2002).

6 Palmer v. Wilson, 502 F.2d 860 (9th Cir. 1974); Findlay v. CitiMortgage, Inc., 813 F. Supp. 2d 108 (D.D.C. 2011) (loan proceeds).

7 Rudisell v. Fifth Third Bank, 622 F.2d 243 (6th Cir. 1980); Singh v. Washington Mut. Bank, 2009 WL 2588885 (N.D. Cal. 2009).

8 Reyes v. Premier Home Funding, Inc., 640 F. Supp. 2d 1147 (N.D. Cal. 2009).

9 Yamamoto v. Bank of New York, 329 F.3d 1167 (9th Cir. 2003).

10 Quenzer v. Advanta Mortg. Corp. USA, 288 B.R. 884 (D. Kan. 2003).

11 Ray v. Citifinancial, Inc., 228 F. Supp. 2d 664 (D. Md. 2002).

12 15 U.S.C.A. § 1635(b).

13 15 U.S.C.A. § 1635(b).

A developer, which provided additional financing for home purchasers through a second mortgage on the home, evidenced by two notes bearing no interest if timely paid, forfeited its right to the loan proceeds, which the purchasers tendered or offered to tender upon electing to rescind the second mortgage transaction, by failing to respond to the purchaser's notice where the purchasers' notification and tender were sufficient and timely. Arnold v. W.D.L. Investments, Inc., 703 F.2d 848 (5th Cir. 1983).

14 Rachbach v. Cogswell, 547 F.2d 502 (10th Cir. 1976); Brown v. National Permanent Federal Sav. and Loan Ass'n, 683 F.2d 444 (D.C. Cir. 1982).

15 Federal Deposit Ins. Corp. v. Hughes Development Co., Inc., 938 F.2d 889 (8th Cir. 1991).

16 In re Williams, 291 B.R. 636 (Bankr. E.D. Pa. 2003).

End of Document

17 Am. Jur. 2d Consumer Protection § 123

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

3. Right of Rescission

§ 123. Award of other relief; attorney's fees

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 60, 67

A.L.R. Library

Award of attorney's fees under sec. 130(a) of Truth in Lending Act (15 U.S.C.A. sec. 1640(a)), 140 A.L.R. Fed. 557

Forms

Forms relating to rescission of credit transaction, generally, see Am. Jur. Pleading and Practice Forms—Truth in Lending and Consumer Credit Protection; Federal Procedural Forms (L.Ed.)—Consumer Credit Protection [Westlaw® Search Query]

In any action in which it is determined that a creditor has violated the right to rescind, in addition to rescission, the court may award relief for violations of the Truth in Lending Act not relating to the right to rescind.[1] A lender's failure to timely take the steps mandated by the Truth in Lending Act's right-of-rescission provision, in response to a borrower's valid notice of rescission,

generally constitutes violation of a requirement of the same provision, for which the lender can be held liable for damages.[2] Thus, the lender's failure to rescind or to tender the return of the borrower's down payment within 20 days[3] is a separate violation of the Truth in Lending Act, giving rise to claims for statutory and actual damages.[4] The cause of action arises, for the purpose of the statute of limitations governing civil liability,[5] 20 days after the creditor's receipt of the rescission notice.[6]

Judgments in cases where a person is determined to have a right of rescission include reasonable attorney's fees.[7] However, a debtor is not entitled to an award of attorney's fees based on a rescission claim where the claim for attorney's fees was previously litigated in a state court action.[8]

Footnotes

1 15 U.S.C.A. § 1635(g), which refers to 15 U.S.C.A. § 1640, discussed in §§ 124 to 141.

2 Egipciaco Ruiz v. R & G Financial Corp., 383 F. Supp. 2d 318 (D.P.R. 2005).

3 § 122.

4 Mount v. LaSalle Bank Lake View, 886 F. Supp. 650 (N.D. Ill. 1995); In re Quenzer, 274 B.R. 899 (Bankr. D. Kan. 2001), decision rev'd on other grounds, 288 B.R. 884 (D. Kan. 2003).

5 15 U.S.C.A. § 1640(e), discussed in § 129.

6 In re McNinch, 250 B.R. 848 (Bankr. W.D. Pa. 2000), subsequently aff'd, 281 F.3d 222 (3d Cir. 2001).

7 § 138.

8 Rollins v. Dwyer, 666 F.2d 141 (5th Cir. 1982).

17 Am. Jur. 2d Consumer Protection § 124

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection

Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

4. Civil Liability

a. In General

§ 124. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 61.1

A.L.R. Library

Civil remedies of consumer for violations of credit transactions provisions of Truth in Lending Act (TILA) (15 U.S.C.A. secs. 1601 et seq.), as amended by Truth in Lending Simplification and Reform Act of 1982, 113 A.L.R. Fed. 173

Any creditor who fails to comply with any requirement imposed under the provisions of the Truth in Lending Act governing disclosures in credit transactions,[1] including any requirement under the rescission provision of the Act,[2] or the provisions added by the Fair Credit Billing Act[3] and the Consumer Leasing Act[4] with respect to any person is liable to that person for actual and statutory damages.[5] The contention that the civil-remedies provision, as applied, is unconstitutional has been rejected.[6]

The fact that penalties may be imposed for a failure to make proper disclosures does not render the underlying obligation unenforceable.[7] Nothing in the Act suggests that its provisions for statutory damages[8] and traditional common-law remedies

for damages are mutually exclusive.[9] The provision of the Act that it does not annul, alter, or affect state law[10] is said to result in parallel remedies permitting the recovery of damages under the Act, as well as under state law.[11]

The civil-recovery provisions of the Act are both penal and remedial in nature.[12]

A general release given by the consumer to the creditor before commencing the truth-in-lending action does not bar the action since such release would thwart the policy of the Act.[13]

Footnotes

1 15 U.S.C.A. §§ 1631 to 1651, discussed in §§ 15 to 89.

2 15 U.S.C.A. § 1635, discussed in §§ 113 to 123.

3 15 U.S.C.A. §§ 1666 to 1666j, discussed in §§ 96 to 99.

4 15 U.S.C.A. §§ 1667 to 1667f, discussed in §§ 100 to 107.

5 15 U.S.C.A. § 1640(a).

6 Franklin v. First Money, Inc., 427 F. Supp. 66 (E.D. La. 1976), judgment aff'd, 599 F.2d 615 (5th Cir. 1979).

7 Charter Finance Co. v. Henderson, 60 Ill. 2d 323, 326 N.E.2d 372 (1975).

8 § 136.

9 Vines v. Hodges, 422 F. Supp. 1292 (D.D.C. 1976) (rejected on other grounds by, Tarplain v. Baker Ford, Inc., 466 F. Supp. 1340 (D.R.I. 1979)).

10 § 261.

11 Merchandise Nat. Bank of Chicago v. Scanlon, 86 Ill. App. 3d 719, 41 Ill. Dec. 826, 408 N.E.2d 248, 29 U.C.C. Rep. Serv. 1100 (1st Dist. 1980).

12 Riggs v. Government Emp. Financial Corp., 623 F.2d 68 (9th Cir. 1980).

13 Parker v. DeKalb Chrysler Plymouth, 459 F. Supp. 184 (N.D. Ga. 1978), judgment aff'd, 673 F.2d 1178 (11th Cir. 1982).

17 Am. Jur. 2d Consumer Protection § 125

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

4. Civil Liability

a. In General

§ 125. Disclosure violations giving rise to creditor liability

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 61.1

A.L.R. Library

Civil remedies of consumer for violations of credit transactions provisions of Truth in Lending Act (TILA) (15 U.S.C.A. secs. 1601 et seq.), as amended by Truth in Lending Simplification and Reform Act of 1982, 113 A.L.R. Fed. 173

The civil liability provision of the Truth in Lending Act, as amended by the Truth in Lending Simplification and Reform Act of 1980,[1] provides that in connection with the disclosures required by creditors[2] and the statement required with each billing cycle,[3] a creditor may have a liability determined only for failing to comply with the rescission statute[4] or the provisions dealing with initial disclosures before an account is opened.[5] With regard to statutory provisions governing open-end consumer credit plans and pertaining to periodic statement disclosures,[6] a creditor may have liability determined only for a failure to comply with statutory provisions requiring disclosure of[7] the amount of any finance charge added to the account during the period; each periodic rate used to compute the finance charge, the range of balances to which it is applicable, and the corresponding nominal annual percentage rate; the total finance charge expressed as an annual percentage rate; the balance on which the finance charge was computed and a statement of how the balance was determined; the outstanding balance in the account at the end of the

period; the date by which or the period within which payment must be made to avoid additional finance charges; the address to be used by the creditor for the purpose of receiving billing inquiries; the effect of making only minimum payments; the late payment deadline; and any increase in interest rates for late payments.[8]

Regarding the Truth in Lending Act provisions governing disclosures in credit and charge card applications and solicitations[9] and with disclosure prior to renewal,[10] a card issuer has a liability under the civil liability provision of the Truth in Lending Act only to a cardholder who pays the described fee[11] or who uses the credit card or charge card.[12]

With regard to closed-end credit plans,[13] the statute sets forth a large number of violations for which a creditor will have a liability determined, including a failure to comply with substantially similar disclosure requirements under state law.[14]

Liability for a failure to make the required disclosures may be imposed only upon the creditor required to make the disclosure except as provided with respect to the liability of assignees.[15]

Observation:

The Truth in Lending Act retains creditor liability for disclosure violations in some areas, but in other areas, disclosure violations no longer result in liability for damages. There is some debate over the effect of the Truth in Lending Simplification and Reform Act of 1980, which established the list of provisions giving rise to liability, described above. The prevailing view appears to be that only violations of the specifically enumerated subsections will support an award of statutory damages.[16] While the view has been stated that the list is actually a list of exceptions to the general rule allowing statutory damages, since the statute[17] provides that both actual and statutory damages are recoverable "except as otherwise provided under this section,"[18] that position has been criticized on the basis that the 1980 amendments were intended to reduce the scope of creditor liability to violations that are central to understanding a credit transaction's costs and terms.[19]

Footnotes

1 15 U.S.C.A. § 1640(a).
2 15 U.S.C.A. § 1637(a), discussed in §§ 31, 33, 34.
3 15 U.S.C.A. § 1637(a), (b), discussed in §§ 33, 34.
4 15 U.S.C.A. § 1635, discussed in §§ 113 to 123.
5 15 U.S.C.A. § 1637(a), discussed in § 33.
6 15 U.S.C.A. § 1637(b), discussed in § 35.
7 15 U.S.C.A. § 1640(a).
8 15 U.S.C.A. § 1637(b)(4) to 15 U.S.C.A. § 1637(b)(12), discussed in § 35.
9 15 U.S.C.A. § 1637(c), discussed in §§ 37, 38.
10 15 U.S.C.A. § 1637(d).
11 As described in 15 U.S.C.A. § 1637(c)(1)(A)(ii)(I) or 15 U.S.C.A. § 1637(c)(4)(A)(i).

12 15 U.S.C.A. § 1640(a).

13 15 U.S.C.A. § 1638, discussed in §§ 61 to 89.

14 15 U.S.C.A. § 1640(a).

15 15 U.S.C.A. § 1640(a).
As to the liability of assignees, see § 127.

16 Brown v. Payday Check Advance, Inc., 202 F.3d 987 (7th Cir. 2000).

17 15 U.S.C.A. § 1640(a).

18 Lozada v. Dale Baker Oldsmobile, Inc., 145 F. Supp. 2d 878 (W.D. Mich. 2001).

19 Kilbourn v. Candy Ford-Mercury, Inc., 209 F.R.D. 121 (W.D. Mich. 2002) (discussing both of the preceding cases).

End of Document

17 Am. Jur. 2d Consumer Protection § 126

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

4. Civil Liability

a. In General

§ 126. Who may recover damages

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 64, 64.1

A.L.R. Library

Civil remedies of consumer for violations of credit transactions provisions of Truth in Lending Act (TILA) (15 U.S.C.A. secs. 1601 et seq.), as amended by Truth in Lending Simplification and Reform Act of 1982, 113 A.L.R. Fed. 173
Survivability of action brought under Truth in Lending Act (15 U.S.C.A. secs. 1601 et seq.), 53 A.L.R. Fed. 431

A creditor is liable to any person to which it had an obligation to comply with a requirement of the Truth in Lending Act.[1] A guarantor, along with the primary obligor, is entitled to recover damages even though the disclosure that violated the Act was made only to the primary obligor.[2]

A truth-in-lending cause of action passes to a trustee in bankruptcy, who then has standing to bring an action to impose civil liability.[3]

A truth-in-lending action survives the death of the claimant[4] although it has been said that the question of survivability must be determined under state law.[5]

Footnotes

1 15 U.S.C.A. § 1640(a).

2 Barash v. Gale Emp. Credit Union, 659 F.2d 765 (7th Cir. 1981).

3 Matter of Wood, 643 F.2d 188 (5th Cir. 1980); Riggs v. Government Emp. Financial Corp., 623 F.2d 68 (9th Cir. 1980).

4 Smith v. No. 2 Galesburg Crown Finance Corp., 615 F.2d 407, 28 Fed. R. Serv. 2d 1136, 28 U.C.C. Rep. Serv. 212, 53 A.L.R. Fed. 406 (7th Cir. 1980) (overruled on other grounds by, Pridegon v. Gates Credit Union, 683 F.2d 182, 34 U.C.C. Rep. Serv. 717 (7th Cir. 1982)).

5 Johnson v. Household Finance Corp., 453 F. Supp. 1327 (S.D. Ill. 1978).

End of Document

17 Am. Jur. 2d Consumer Protection § 127

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection

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Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

4. Civil Liability

a. In General

§ 127. Liability of assignees; effect of status as assignee on claim for rescission

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 63

Any civil action for a violation of the Truth in Lending Act (TILA) or proceeding under the administrative-enforcement statute,[1] which may be brought against a creditor, may be maintained against an assignee only if the violation is apparent on the face of the disclosure statement and may not be maintained where the assignment was involuntary.[2] The liability is joint and several.[3]

An assignee's obligation is more limited than the creditor's as creditors are primarily responsible for making required disclosures and ensuring that they are accurate while assignees need only review the assigned documents.[4] Only violations that a reasonable person could spot on the face of the disclosure statement or other assigned documents result in liability.[5] The "apparent on the face" requirement means that no additional duty of inquiry is imposed on assignees.[6] Therefore, an assignee is not liable for a violation that is not apparent on the face of the disclosure where the assignee would have been forced to check documents other than the disclosure statement.[7] There is no liability even though the assignee allegedly had independent knowledge that dealers do not properly disclose certain costs or fees[8] or had access to a list of fees.[9]

The incorporation into a retail-installment contract of the language of a federal regulation on an assignee's liability does not override the Truth in Lending Act's express terms, and an assignee does not waive its protection by accepting a contract containing that language.[10] Thus, a notice in a contract that holders take subject to all claims and defenses that the buyer could

assert against the seller, which was not the result of bargaining between the parties, must be construed in light of the limitations on an assignee's liability in the Truth in Lending Act.[11]

Except as otherwise provided with regard to rescission,[12] in any action or proceeding by or against any subsequent assignee of the original creditor, without knowledge to the contrary when the assignee acquired the obligation, a written acknowledgement by a person entitled to receive a statement required by the Act of its receipt is conclusive proof that it was delivered and, except as provided above, is also conclusive proof of compliance with the statutory disclosure provisions.[13] This provision does not affect the rights of the obligor in any action against the original creditor.[14] Thus, unlike a statutory damages claim against an assignee, a rescission claim against an assignee may be brought even if there is no TILA violation apparent on the face of the loan documents.[15]

Special rules govern borrowers' rights against assignees of certain mortgages[16] and in connection with consumer credit transactions secured by real property.[17]

A servicer is not treated as an assignee unless it is or was the owner of the obligation.[18] It also is not treated as an assignee on the basis of an assignment of the obligation solely for the servicer's administrative convenience.[19] A servicer that becomes the actual owner of the mortgage may be held liable as an assignee.[20]

Footnotes

1 15 U.S.C.A. § 1607, discussed in §§ 109 to 112.

2 15 U.S.C.A. § 1641(a).

3 Greenlee v. Steering Wheel, Inc., 693 F. Supp. 1396 (D. Conn. 1988).

4 Jackson v. South Holland Dodge, Inc., 197 Ill. 2d 39, 258 Ill. Dec. 79, 755 N.E.2d 462 (2001).

5 Taylor v. Quality Hyundai, Inc., 150 F.3d 689 (7th Cir. 1998); Keiran v. Home Capital, Inc., 720 F.3d 721 (8th Cir. 2013), petition for cert. filed, 82 U.S.L.W. 3383 (U.S. Dec. 9, 2013); Jackson v. South Holland Dodge, Inc., 197 Ill. 2d 39, 258 Ill. Dec. 79, 755 N.E.2d 462 (2001).

6 Taylor v. Quality Hyundai, Inc., 150 F.3d 689 (7th Cir. 1998).

7 Ramadan v. Chase Manhattan Corp., 229 F.3d 194 (3d Cir. 2000) (assignee may rely on retail-installment contract assigned to it and need not check other documents the dealer sent to the lender); Ellis v. General Motors Acceptance Corp., 160 F.3d 703 (11th Cir. 1998); Jordan v. Chrysler Credit Corp., 73 F. Supp. 2d 469 (D.N.J. 1999).

8 Balderos v. City Chevrolet, 214 F.3d 849 (7th Cir. 2000); Walker v. Wallace Auto Sales, Inc., 155 F.3d 927 (7th Cir. 1998).

9 Green v. Levis Motors, Inc., 179 F.3d 286 (5th Cir. 1999).

10 Walker v. Wallace Auto Sales, Inc., 155 F.3d 927 (7th Cir. 1998); Ellis v. General Motors Acceptance Corp., 160 F.3d 703 (11th Cir. 1998).

11 Ramadan v. Chase Manhattan Corp., 229 F.3d 194 (3d Cir. 2000); Taylor v. Quality Hyundai, Inc., 150 F.3d 689 (7th Cir. 1998).

12 15 U.S.C.A. § 1635(c), discussed in §§ 113, 121.

13 15 U.S.C.A. § 1641(b).

14 15 U.S.C.A. § 1641(b).

15 Ward v. Security Atlantic Mortg. Electronic Registration Systems, Inc., 858 F. Supp. 2d 561 (E.D. N.C. 2012), appeal dismissed, 4th Cir. 12-1416 (May 30, 2012).

16 15 U.S.C.A. § 1641(d).

17 15 U.S.C.A. § 1641(e).

18 15 U.S.C.A. § 1641(f)(1).

19 15 U.S.C.A. § 1641(f)(2).

20 Myers v. Citicorp Mortg. Inc., 878 F. Supp. 1553 (M.D. Ala. 1995).

End of Document

17 Am. Jur. 2d Consumer Protection § 128

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection

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Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

4. Civil Liability

a. In General

§ 128. Commencing action; jurisdiction

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 64.1

An action for damages under the Truth in Lending Act[1] may be brought in any United States district court or in any other court of competent jurisdiction.[2] To sustain federal jurisdiction, the action must involve a consumer-credit transaction within the meaning of the Act,[3] but the action is not to be dismissed simply because the consumer's actual damages are insignificant.[4]

A bankruptcy court has jurisdiction over a truth-in-lending claim.[5]

A state court is a court of competent jurisdiction in which an action may be brought to enforce a claim under the Truth in Lending Act.[6] The state and federal courts have concurrent jurisdiction[7] although the fact of concurrent jurisdiction does not bar the removal of an action from a state to a federal court on the creditor's motion[8] since a federal court has original jurisdiction.[9] A class action to impose civil liability upon a creditor may be brought in a state court,[10] but the limitation of recovery under the Act[11] applies in the state court action.[12] A federal court which has jurisdiction over a Truth in Lending Act class action has pendent jurisdiction over a claim that the creditor had also violated a state consumer-protection law having substantially similar terms[13] but not where the potential recovery on the state class-action claim was significantly greater than the amount prescribed by the Federal Act.[14]

Observation:

Res judicata may bar an action in the federal court under the Truth in Lending Act where the identical cause of action was adjudicated between the same parties in a prior action in the state court.[15]

Footnotes

1 15 U.S.C.A. § 1640.
2 15 U.S.C.A. § 1640(e).
3 Kenney v. Landis Financial Group, Inc., 376 F. Supp. 852 (N.D. Iowa 1974).
4 Villanueva v. Motor Town, Inc., 619 F.2d 632 (7th Cir. 1980).
5 Matter of Garner, 556 F.2d 772 (5th Cir. 1977).
6 Perry v. American Finance Corp. of Milford, 372 A.2d 224 (Del. Super. Ct. 1977).
7 Mitchell v. General Finance Corp. of Georgia, 79 F.R.D. 82 (N.D. Ga. 1978).
8 Sicinski v. Reliance Funding Corp., 461 F. Supp. 649, 26 Fed. R. Serv. 2d 860 (S.D. N.Y. 1978).
9 Gandy v. Peoples Bank and Trust Co., 224 B.R. 340 (S.D. Miss. 1998).
10 Vickers v. Home Federal Sav. and Loan Ass'n of East Rochester, 56 A.D.2d 62, 390 N.Y.S.2d 747 (4th Dep't 1977).
11 § 137.
12 Kaminski v. Shawmut Credit Union, 416 F. Supp. 1119, 21 Fed. R. Serv. 2d 1332 (D. Mass. 1976).
13 Kaminski v. Shawmut Credit Union, 416 F. Supp. 1119, 21 Fed. R. Serv. 2d 1332 (D. Mass. 1976); Copley v. Rona Enterprises, Inc., 423 F. Supp. 979 (S.D. Ohio 1976).
14 Wesley v. John Mullins & Sons, Inc., 444 F. Supp. 117, 24 Fed. R. Serv. 2d 1054 (E.D. N.Y. 1978).
15 Mays v. Brent, 546 F.2d 1154 (5th Cir. 1977).

End of Document

17 Am. Jur. 2d Consumer Protection § 129

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

4. Civil Liability

a. In General

§ 129. Time limitation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 65

A.L.R. Library

Time limitations under 15 U.S.C.A. sec. 1640(e) on Truth in Lending suits, 36 A.L.R. Fed. 657

Forms

Forms relating to statute of limitations, see Am. Jur. Pleading and Practice Forms—Truth in Lending and Consumer Credit Protection; Federal Procedural Forms (L.Ed.)—Consumer Credit Protection [Westlaw® Search Query]

Except as provided with respect to certain mortgage-related violations,[1] an action to impose creditor civil liability must be brought within one year from the date of the occurrence of the violation.[2]

As a general rule, in a closed-end consumer credit transaction, the limitation period begins to run either from the date of the execution of the credit contract[3] or at the time of its performance.[4] With regard to open-end consumer credit transactions, the limitation period has been measured from the date on which a finance charge was first imposed.[5] An action based on a deceptive credit card solicitation accrues, for limitations purposes, on date that the debtor received the solicitation.[6] An action based on a mortgage lender's failure to comply with the disclosure requirements in connection with an interest rate increase pursuant to the variable-rate provision of a mortgage agreement was timely filed within one year of when the increase took effect on the basis that the imposition of a new rate was the consummation of a new-credit transaction, without making the required disclosures.[7]

According to a number of decisions, the statute is tolled by fraudulent concealment[8] (not to be confused with mere nondisclosure)[9] which misleads the debtor about the application of the statute of limitations;[10] however, there is also authority that that the one-year period is jurisdictional and cannot be extended on a theory of equitable tolling.[11]

The manner of computing time described in Fed. R. Civ. P. 6(a) applies.[12] In cases brought in state court,[13] state procedural rules are followed since the Truth in Lending Act does not provide its own rule.[14] Questions resolved by the courts in applying the one-year period of limitations include those pertaining to the final day for filing papers,[15] the relation-back of amended pleadings,[16] the right of a bankruptcy trustee to bring the action even after the statute has run,[17] and the effect of a deferral or extension of an original loan.[18] The filing of a class action tolls the running of the statute for the entire class.[19]

CUMULATIVE SUPPLEMENT

Cases:

Language of the Fair Debt Collection Practices Act (FDCPA), which provides that claims must be brought within one year from the date on which the violation occurs, unambiguously sets the date of the violation as the event that starts the one-year limitations period. Consumer Credit Protection Act § 813, 15 U.S.C.A. § 1692k(d). Bender v. Elmore & Throop, P.C., 963 F.3d 403 (4th Cir. 2020).

Derivative liability imposed by the Home Ownership Equity Protection Act (HOEPA) on certain assignees of mortgages does not allow a plaintiff to avoid an applicable statute of limitations. Truth in Lending Act, § 131(d), 15 U.S.C.A. § 1641(d). Wong v. Wells Fargo Bank N.A., 789 F.3d 889 (8th Cir. 2015).

Home mortgagor's claim against bank that acquired original mortgagee's assets, asserting that bank violated Truth in Lending Act (TILA) by failing to disclose to mortgagor the identity of current noteholder when note was assigned, accrued, for limitations purposes, at latest when mortgagor lost title to the home through nonjudicial foreclosure. Truth in Lending Act §§ 130(e)(g), 131, 15 U.S.C.A. §§ 1640(e), 1641(g). Hamilton v. JPMorgan Chase Bank, 118 F. Supp. 3d 328 (D.D.C. 2015).

Limitations period governing TILA claims brought by borrowers against mortgage lender, stemming from lender's failure to provide name and address of owner of the obligation or master servicer of the obligation, was not equitably tolled; borrowers were aware that they received no response to their request, which was more than one year before filing their complaint, and asserted no additional allegations to warrant equitable tolling. 15 U.S.C.A. § 1635; Truth in Lending Act § 130, 15 U.S.C.A. § 1640(e). Bazemore v. U.S. Bank, N.A., 167 F. Supp. 3d 1346 (N.D. Ga. 2016).

Continuing violations doctrine applied to mortgagors' claims that mortgagees, insurers, and reinsurers engaged in a captive reinsurance scheme that involved paying kickbacks in violation of RESPA, and thus one-year limitations period restarted each month, when mortgagors paid mortgage insurance premiums with their monthly mortgage payments; while mortgagees,

insurers, and reinsurers asserted that limitations period began at closing, RESPA prohibited certain post-closing kickbacks, fees, and referrals, and RESPA was violated each and every time an unlawful fee or kickback was delivered or accepted, since such payments were not merely continuing ill effects of a prior violation, but were violations in their own right. Real Estate Settlement Procedures Act of 1974 §§ 8, 16, 12 U.S.C.A. §§ 2607, 2614. Blake v. JPMorgan Chase Bank, N.A., 259 F. Supp. 3d 249 (E.D. Pa. 2017).

Employees' claims against employer under the Fair Credit Reporting Act (FCRA) provision requiring employers to provide employees with consumer reports before taking adverse employment action based on such reports accrued under the discovery rule, and two-year limitations period began to run, no later than date of each employee's termination; latest possible date for each employee to have discovered facts underlying violation was termination date, since that was point when employee learned that employer took adverse employment action without providing a copy of the consumer report or a written explanation of rights, as required by statute. Consumer Credit Protection Act §§ 604, 618, 15 U.S.C.A. §§ 1681b(b)(3), 1681p. Anderson v. Wells Fargo Bank, N.A., 266 F. Supp. 3d 1175 (D.S.D. 2017).

Truth in Lending Act (TILA) imposes a one-year statute of limitations on monetary damages claims, with certain exceptions, and a three-year statute of limitations on claims for rescission. Truth in Lending Act §§ 125, 130, 15 U.S.C.A. §§ 1635(f), 1640(e). In re Residential Capital, LLC, 513 B.R. 856 (Bankr. S.D. N.Y. 2014).

Claim for statutory damages asserted by mortgagor, which was trustee of land trust, resulting from mortgagee's failure to rescind after mortgagor exercised that right was not time-barred; notice of rescission was sent to mortgagee on June 2, 2011, after mortgagee did not respond, mortgagor filed counterclaim for damages in foreclosure action on July 19, 2011 and, thus, mortgagor's claim for damages was brought within one year of occurrence. Truth in Lending Act, § 130, 15 U.S.C.A. § 1640. Financial Freedom Acquisition, LLC v. Standard Bank and Trust Co., 2015 IL 117950, 398 Ill. Dec. 1, 43 N.E.3d 911 (Ill. 2015).

Homeowner's claims for unfair or deceptive acts in violation of Consumer Protection Act against contractor who constructed home, based on contractor's alleged yearly representations that he had performed successful repairs of cause of home's water seepage, did not accrue only upon completion of home construction for purposes of the two-year limitations period; contractor allegedly committed separate acts of deception on separate occasions. MCA 27–2–211(1)(c), 30–14–103. Hein v. Sott, 2015 MT 196, 353 P.3d 494 (Mont. 2015).

Violation of TILA occurs when transaction is consummated. Truth in Lending Act, §§ 129, 129B, 129C, 130, 15 U.S.C.A. §§ 1639, 1639b, 1639c, 1640. Zaman v. Felton, 219 N.J. 199, 98 A.3d 503 (2014).

[END OF SUPPLEMENT]

Footnotes

1 15 U.S.C.A. § 1640(e), establishing a three-year statute of limitations with respect to violations of 15 U.S.C.A. §§ 1639, 1639b, 1639c.

2 15 U.S.C.A. § 1640(e).

3 Bartholomew v. Northampton Nat. Bank of Easton, Easton, Pa., 584 F.2d 1288, 49 A.L.R. Fed. 768 (3d Cir. 1978).
A suit predicated on disclosure violations was timely filed within one year of the date the mortgage contract was executed, and the period did not start on the date of the mortgage commitment. Postow v. Oriental Bldg. Ass'n, 390 F. Supp. 1130 (D.D.C. 1975).

4 Rudisell v. Fifth Third Bank, 622 F.2d 243 (6th Cir. 1980); Dryden v. Lou Budke's Arrow Finance Co., 630 F.2d 641 (8th Cir. 1980).

5 Goldman v. First Nat. Bank of Chicago, 532 F.2d 10, 21 Fed. R. Serv. 2d 710, 36 A.L.R. Fed. 638 (7th Cir. 1976); Baskin v. G. Fox & Co., 550 F. Supp. 64 (D. Conn. 1982).

6 Deaville v. Capital One Bank, 425 F. Supp. 2d 744 (W.D. La. 2006).

For a general discussion of credit cards, see Am. Jur. 2d, Credit Cards and Charge Accounts §§ 1 et seq.

7 Nash v. First Financial Sav. and Loan Ass'n, 703 F.2d 233 (7th Cir. 1983).

8 Ramadan v. Chase Manhattan Corp., 156 F.3d 499 (3d Cir. 1998) (stating that the time limit is not jurisdictional); King v. State of Cal., 784 F.2d 910 (9th Cir. 1986) (rejected by, Baldwin v. Laurel Ford Lincoln-Mercury, Inc., 32 F. Supp. 2d 894 (S.D. Miss. 1998)); Ellis v. General Motors Acceptance Corp., 160 F.3d 703 (11th Cir. 1998); Davis v. Edgemere Finance Co., 523 F. Supp. 1121 (D. Md. 1981); Chevalier v. Baird Sav. Ass'n, 371 F. Supp. 1282, 18 Fed. R. Serv. 2d 444 (E.D. Pa. 1974).

There was no equitable tolling where a mortgagor failed to explain in his complaint why he was prevented from discovering a mortgagee's alleged TILA violations within the one-year statutory period. Lingad v. Indymac Federal Bank, 682 F. Supp. 2d 1142 (E.D. Cal. 2010).

The fraudulent-concealment doctrine did not apply to toll the one-year statute of limitations where the matter was disclosed on the promissory note the borrower had signed, and the borrower could have discovered it with due diligence. In re Roberson, 262 B.R. 312 (Bankr. E.D. Pa. 2001).

9 Boursiquot v. Citibank F.S.B., 323 F. Supp. 2d 350 (D. Conn. 2004) (to apply the doctrine of fraudulent concealment to mere nondisclosure would be to nullify the statute of limitations).

10 Deaville v. Capital One Bank, 425 F. Supp. 2d 744 (W.D. La. 2006).

11 Baldwin v. Laurel Ford Lincoln-Mercury, Inc., 32 F. Supp. 2d 894 (S.D. Miss. 1998).

12 Krajci v. Provident Consumer Discount Co., 525 F. Supp. 145, 33 Fed. R. Serv. 2d 1741 (E.D. Pa. 1981), aff'd, 688 F.2d 822 (3d Cir. 1982).

As to the computation of time under Fed. R. Civ. P. 6(a), see Am. Jur. 2d, Pleading § 861.

13 § 128.

14 Braggs v. Jim Skinner Ford, Inc., 396 So. 2d 1055 (Ala. 1981).

15 Souife v. First Nat. Bank of Commerce, New Orleans, La., 452 F. Supp. 818, 25 Fed. R. Serv. 2d 922 (E.D. La. 1978), aff'd in part, rev'd in part on other grounds, 628 F.2d 480 (5th Cir. 1980), opinion withdrawn on other grounds, 653 F.2d 142 (5th Cir. 1981) and judgment aff'd, 653 F.2d 142 (5th Cir. 1981); Braggs v. Jim Skinner Ford, Inc., 396 So. 2d 1055 (Ala. 1981).

16 Ecenrode v. Household Finance Corp. of South Dover, 422 F. Supp. 1327 (D. Del. 1976).

17 Matter of Dickson, 432 F. Supp. 752 (W.D. N.C. 1977).

18 Jacklitch v. Redstone Federal Credit Union, 463 F. Supp. 1134 (N.D. Ala. 1979).

19 Jacklitch v. Redstone Federal Credit Union, 463 F. Supp. 1134 (N.D. Ala. 1979).

End of Document

17 Am. Jur. 2d Consumer Protection § 130

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
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Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

4. Civil Liability

a. In General

§ 130. Time limitation—Recoupment or setoff in action brought after statute has run

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 65

The statutory provision requiring that an action to impose creditor liability under the Truth in Lending Act (TILA) must be brought within one year from the date of the occurrence of the violation[1] does not bar the assertion of a violation in an action to collect the debt, which is brought more than one year from the date of the occurrence of the violation, as a matter of defense by recoupment or setoff except as otherwise provided by state law.[2] The recoupment provision applies where the TILA claim and the debt collection or foreclosure claim arise out of the same transaction.[3] The recoupment theory is also available in bankruptcy, allowing the debtor to object to the proof of a claim filed by a lender that allegedly violated the Act.[4] However, recoupment is available only in an action to collect a debt, and a nonjudicial foreclosure is not such an action.[5] Also, the debtor may not assert a time-barred claim for monetary damages on a recoupment theory where the debtor's demand is not in the nature of a defense, and the main action is not timely.[6] A debtor who brings the creditor into court may not revive a time-barred claim by characterizing the suit as a defense to an illegal claim because recoupment is exempt from the one-year statute of limitations only when the debtor's claim is raised as a defense or counterclaim to the creditor's action to collect the debt.[7]

Footnotes

1 § 129.

2 15 U.S.C.A. § 1640(e).
The one-year TILA statute of limitations applied to a mortgagor's claim for damages against mortgagees where the mortgagor stated the claim affirmatively in an action she had commenced rather than as a recoupment defense to the foreclosure action initiated by defendants. Midouin v. Downey Sav. and Loan Ass'n, F.A., 834 F. Supp. 2d 95 (E.D. N.Y. 2011).

3 In re Jones, 122 B.R. 246 (W.D. Pa. 1990).

4 In re Norris, 138 B.R. 467 (E.D. Pa. 1992).

5 Molina v. OneWest Bank, FSH, 903 F. Supp. 2d 1008 (D. Haw. 2012).

6 In re Smith, 737 F.2d 1549 (11th Cir. 1984).

7 Moor v. Travelers Ins. Co., 784 F.2d 632 (5th Cir. 1986).

End of Document

17 Am. Jur. 2d Consumer Protection § 131

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection

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Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

4. Civil Liability

a. In General

§ 131. Pleadings

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 64.1

Forms

Forms relating to petitions in federal court for violation of truth in lending act or failure to make required disclosures, generally, see Am. Jur. Pleading and Practice Forms—Moneylenders and Pawnbrokers [Westlaw® Search Query]

An allegation that there is a credit balance over $1 in borrowers' accounts, as required for application of the Truth in Lending Act (TILA) statute and regulation governing treatment of credit balances,[1] is implicit in a TILA claim alleging that the lender's failure to credit borrowers for excess charges amounted to a violation of the statute and regulation.[2]

Allegations in a complaint by borrowers, that their mortgage broker and a company from which they obtained title insurance were under common management and control, and that the fee which they paid for title insurance, being roughly twice the prevailing market rate, included compensation for the broker that should have been disclosed as part of the finance charge, were not sufficient to state a claim under TILA for alleged understatement of the finance charge on a TILA disclosure statement where the borrowers had not alleged that they were not provided with title insurance, such that the title insurer was at least

entitled to the prevailing rate for its services, and where, assuming that the excess portion of the fee was additional, undisclosed compensation to the broker, the excess portion of the fee would not cause the true finance charge to vary from that disclosed by more than the amount permitted under the implementing regulations.[3]

CUMULATIVE SUPPLEMENT

Cases:

Even if borrowers' complaint, in which borrowers alleged that lenders who foreclosed on borrowers' home violated the Federal Trade Commission Act, could be read as having been brought pursuant to Massachusetts consumer protection law based on violation of the Act, as borrowers argued given that Act provided no private right of action, borrowers nonetheless failed to state a claim under the Act; the Massachusetts law required that borrowers set forth any activities in their demand letter as to which they sought relief, and foreclosed as a matter of law separate relief on actions not so mentioned, but borrowers' demand letter that alleged claims under Massachusetts law alleged no violation of the Act. Federal Trade Commission Act § 5, 15 U.S.C.A. § 45; Mass. Gen. Laws ch. 93A. Flores v. OneWest Bank, F.S.B., 886 F.3d 160 (1st Cir. 2018).

[END OF SUPPLEMENT]

Footnotes

1 15 U.S.C.A. § 1666d; 12 C.F.R. § 1026.21.

2 Vincent v. Money Store, 402 F. Supp. 2d 501 (S.D. N.Y. 2005).

3 Guise v. BWM Mortg., LLC, 377 F.3d 795 (7th Cir. 2004) (also upholding the district court's denial of the borrowers' motion to amend their complaint).

17 Am. Jur. 2d Consumer Protection § 132

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection

Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

4. Civil Liability

a. In General

§ 132. Trial

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 64.1

A creditor sued in a Truth in Lending Act class action for a damage award is entitled to a jury trial on the issue of damages.[1] A case presenting both damage and equitable claims may be bifurcated into jury and bench trials.[2]

Footnotes

1 Barber v. Kimbrell's, Inc., 577 F.2d 216, 25 Fed. R. Serv. 2d 815 (4th Cir. 1978).

2 In re Spence, 276 B.R. 149 (Bankr. N.D. Miss. 2001).

End of Document

17 Am. Jur. 2d Consumer Protection § 133

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

4. Civil Liability

a. In General

§ 133. Judicial enforcement of arbitration clause

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 64.1

A.L.R. Library

Validity of Arbitration Clause Precluding Class Actions, 13 A.L.R.6th 145

Trial Strategy

Proof that an Arbitration Clause in a Commercial Transaction Agreement is Properly Challenged as Inapplicable to or Unenforceable Against the Parties, 70 Am. Jur. Proof of Facts 3d 379

A court may compel arbitration of Truth in Lending Act claims, when a loan agreement contains an arbitration clause, as neither the Act's legislative history nor statutory text clearly expresses a congressional intent to preclude arbitration.[1] Although state law

may preclude such limitations,[2] an arbitration provision in a loan agreement that bars classwide relief is generally enforceable.[3] However, an arbitration clause in a retail-installment contract will not be enforced if doing so would preclude the borrower from effectively vindicating rights under the Truth in Lending Act, due to the cost.[4]

CUMULATIVE SUPPLEMENT

Cases:

No external constraints barred applicability of arbitration provision in used vehicle buyer's retail installment sale agreement with dealer to buyer's claim that vehicle was defective from date of purchase; despite buyer's claim that she was the weaker party with zero participation in the drafting of the contract and that she was presented with a take-it-or-leave-it contract, neither duress nor procedural unconscionability were pleaded or supported by the evidence. Jackson Mac Haik CDJR, Ltd. v. Hester, 291 So. 3d 333 (Miss. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Johnson v. West Suburban Bank, 225 F.3d 366, 48 Fed. R. Serv. 3d 168 (3d Cir. 2000); Stout v. J.D. Byrider, 228 F.3d 709, 47 Fed. R. Serv. 3d 1037, 2000 FED App. 0307P (6th Cir. 2000).

2 Lozada v. Dale Baker Oldsmobile, Inc., 91 F. Supp. 2d 1087 (W.D. Mich. 2000).

3 Johnson v. West Suburban Bank, 225 F.3d 366, 48 Fed. R. Serv. 3d 168 (3d Cir. 2000); Randolph v. Green Tree Financial Corp.—Alabama, 244 F.3d 814 (11th Cir. 2001).
Under Missouri law, as predicted by the court of appeals, a class-action waiver contained in an arbitration clause of contract between a cardholder and a creditor was not unconscionable, and thus, it was enforceable in the cardholder's putative class action alleging that the creditor violated the Truth in Lending Act by issuing preloaded, stored-value cards without making required disclosures where it did not limit the cardholder's remedies, and it appeared conspicuously in the contract. Pleasants v. American Exp. Co., 541 F.3d 853 (8th Cir. 2008).

4 Camacho v. Holiday Homes, Inc., 167 F. Supp. 2d 892 (W.D. Va. 2001).

End of Document

17 Am. Jur. 2d Consumer Protection § 134

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection

Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

4. Civil Liability

b. Damages and Fees Recoverable; Setoff or Counterclaim

§ 134. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 61.1, 67

A.L.R. Library

Civil remedies of consumer for violations of credit transactions provisions of Truth in Lending Act (TILA) (15 U.S.C.A. secs. 1601 et seq.), as amended by Truth in Lending Simplification and Reform Act of 1982, 113 A.L.R. Fed. 173

Except as otherwise provided in the governing statute,[1] any creditor who fails to comply with any requirement imposed under the credit transactions provisions of the Truth in Lending Act[2] with respect to any person is liable to such person in an amount equal to the sum of:

(1) any actual damage sustained by such person as a result of the failure;[3]

(2) statutory damages;[4]

(3) costs and attorney's fees;[5] and

(4) in the case of a failure to comply with any requirement under certain statutory provisions pertaining to mortgages,[6] an amount equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material.[7]

Footnotes

1 15 U.S.C.A. § 1640(a).

2 The specific reference is to 15 U.S.C.A. §§ 1631 to 1651, including any requirement under 15 U.S.C.A. § 1635, 15 U.S.C.A. § 1641(f), (g), or 15 U.S.C.A. §§ 1666 to 1667f.

3 § 135.

4 §§ 136, 137.

5 §§ 138, 139.

6 The specific reference is to 15 U.S.C.A. §§ 1639, 1639b(c)(1), (c)(2), 1639c(a), discussed in §§ 222, 223, 228 to 230.

7 15 U.S.C.A. § 1640(a)(4).

17 Am. Jur. 2d Consumer Protection § 135

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection

Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

4. Civil Liability

b. Damages and Fees Recoverable; Setoff or Counterclaim

§ 135. Actual damages

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 61.1, 67

A.L.R. Library

Civil remedies of consumer for violations of credit transactions provisions of Truth in Lending Act (TILA) (15 U.S.C.A. secs. 1601 et seq.), as amended by Truth in Lending Simplification and Reform Act of 1982, 113 A.L.R. Fed. 173

Among the relief available under the Truth in Lending Act (TILA) is recovery for any actual damage sustained as a result of the creditor's failure.[1] Generally, civil damages are appropriate when disclosure requirements have been violated[2] even where the violation is technical,[3] or there was only one violation.[4] However, it has been said that as a prerequisite to recovery, there must be some relationship between the alleged violation and the congressional purpose of meaningful disclosure.[5] Furthermore, unlike in the case of statutory damages,[6] detrimental reliance is an element of a claim for actual damages.[7] Thus, if a debtor is fully informed and completely understands the terms of the credit agreement, but the creditor fails to comply with some requirement of the Act that does not impede the debtor's understanding of the terms of the loan, there is no sensible rationale for awarding actual damages.[8]

The section of TILA providing a private cause of action for damages requires causation to recover actual damages.[9] Actual damages awardable are those that proximately flow from the disclosure violation.[10]

CUMULATIVE SUPPLEMENT

Cases:

Harm is not a prerequisite for relief under the Truth in Lending Act (TILA). Truth in Lending Act, § 102 et seq., 15 U.S.C.A. § 1601 et seq. Lea v. Buy Direct, L.L.C., 755 F.3d 250 (5th Cir. 2014).

[END OF SUPPLEMENT]

Footnotes

1 15 U.S.C.A. § 1640(a)(1).

2 Mitchell v. Security Inv. Corp. of Palm Beaches, 464 F. Supp. 650 (S.D. Fla. 1979).

3 Grant v. Imperial Motors, 539 F.2d 506 (5th Cir. 1976); Dixey v. Idaho First Nat. Bank, 677 F.2d 749 (9th Cir. 1982).

4 O'Neil v. Four States Builders and Remodelers, Inc., 484 F. Supp. 18 (E.D. Pa. 1979); Reliable Credit Service, Inc. v. Bernard, 339 So. 2d 952 (La. Ct. App. 4th Cir. 1976), writ denied, 342 So. 2d 215 (La. 1977) and writ denied, 341 So. 2d 1129 (La. 1977).

5 Dzadovsky v. Lyons Ford Sales, Inc., 452 F. Supp. 606 (W.D. Pa. 1978), judgment aff'd, 593 F.2d 538 (3d Cir. 1979).

6 § 136.

7 Vallies v. Sky Bank, 591 F.3d 152 (3d Cir. 2009); In re Ferrell, 539 F.3d 1186 (9th Cir. 2008).
An automobile buyer was not entitled to actual damages where the buyer had not read any of the contract documents and thus could not have relied on inaccurate disclosures. Rucker v. Sheehy Alexandria, Inc., 228 F. Supp. 2d 711 (E.D. Va. 2002).

8 Dzadovsky v. Lyons Ford Sales, Inc., 452 F. Supp. 606 (W.D. Pa. 1978), judgment aff'd, 593 F.2d 538 (3d Cir. 1979).

9 Vallies v. Sky Bank, 591 F.3d 152 (3d Cir. 2009).

10 Cirone-Shadow v. Union Nissan of Waukegan, 955 F. Supp. 938 (N.D. Ill. 1997) (where an automobile dealer failed to disclose that it was retaining a portion of a fee charged for extended warranty coverage, damages were based on the likelihood that consumers would have looked elsewhere or foregone a service contract—not necessarily the amount the dealer retained).

17 Am. Jur. 2d Consumer Protection § 136

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

4. Civil Liability

b. Damages and Fees Recoverable; Setoff or Counterclaim

§ 136. Statutory damages in individual action

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 67

A.L.R. Library

Validity, Construction, and Application of Truth in Lending Act (TILA) and Regulations Promulgated Thereunder—United States Supreme Court Cases, 67 A.L.R. Fed. 2d 567

Civil remedies of consumer for violations of credit transactions provisions of Truth in Lending Act (TILA) (15 U.S.C.A. secs. 1601 et seq.), as amended by Truth in Lending Simplification and Reform Act of 1982, 113 A.L.R. Fed. 173

Forms

Forms relating to statutory damages or statutory penalties, see Am. Jur. Pleading and Practice Forms—Truth in Lending and Consumer Credit Protection; Federal Procedural Forms (L.Ed.)—Consumer Credit Protection [Westlaw® Search Query]

In addition to actual damages sustained,[1] a creditor may be liable, in the case of an individual action, for statutory damages which depend on the nature of the transaction and are subject to certain minimum and maximum limits.[2] The limits apply to individual actions under the Truth in Lending Act occurring in connection with a loan secured by personal property, as well as the other types of transactions enumerated in the statute.[3]

A plaintiff need not prove that he or she suffered actual monetary damage to recover statutory damages.[4] Statutory damages are recoverable, even though the debtor was not personally deceived,[5] on the basis that a proven violation of the disclosure requirements is presumed to injure borrowers by frustrating their right to compare various available credit terms.[6]

The imposition of the minimum penalty is proper in cases where the finance charge is nonexistent or undetermined[7] or where twice the amount of the finance charge is less than the minimum.[8] Where the finance charge is capable of determination, and exceeds one-half of the minimum, the award should be for twice that amount, within the statutory limit,[9] and is not limited to the statutory minimum.[10] The maximum penalty should be awarded when appropriate.[11] Appellate review of an award of statutory damages is de novo.[12]

Consummation of the transaction in question is necessary before penalties for nondisclosure can be awarded.[13]

Footnotes

1 § 135.

2 15 U.S.C.A. § 1640(a)(2)(A).

3 Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 125 S. Ct. 460, 160 L. Ed. 2d 389 (2004) (the provision of the Truth In Lending Act (TILA) setting minimum and maximum amounts for statutory damage awards "under this subparagraph" applies generally to awards made under either of the first two clauses of that subparagraph, both in individual actions to recover for TILA violation occurring in connection with a loan secured by personal property and in individual actions relating to a consumer lease, despite the ambiguity arising from the statutory amendment adding a third clause to that subparagraph, which increased the minimum and maximum amounts for TILA violations occurring in connection with closed-end mortgages).

4 Purtle v. Eldridge Auto Sales, Inc., 91 F.3d 797, 1996 FED App. 0247P (6th Cir. 1996); Baker v. G. C. Services Corp., 677 F.2d 775 (9th Cir. 1982).

5 McGowan v. King, Inc., 569 F.2d 845 (5th Cir. 1978); Purtle v. Eldridge Auto Sales, Inc., 91 F.3d 797, 1996 FED App. 0247P (6th Cir. 1996).

6 Herrera v. First Northern Sav. and Loan Ass'n, 805 F.2d 896, 6 Fed. R. Serv. 3d 878 (10th Cir. 1986).

7 Mourning v. Family Publications Service, Inc., 411 U.S. 356, 93 S. Ct. 1652, 36 L. Ed. 2d 318 (1973).

8 Strange v. Monogram Credit Card Bank of Georgia, 129 F.3d 943 (7th Cir. 1997).

9 Young v. Ouachita Nat. Bank in Monroe, 428 F. Supp. 1323 (W.D. La. 1977); Campbell v. Liberty Financial Planning, Inc., 422 F. Supp. 1386 (D. Neb. 1976).

10 Killings v. Jeff's Motors, Inc., 490 F.2d 865 (5th Cir. 1974).

11 Rogers v. Frank Jackson Lincoln-Mercury, 458 F. Supp. 1387 (N.D. Ga. 1978), judgment aff'd, 621 F.2d 130 (5th Cir. 1980), decision aff'd in part, rev'd in part on other grounds, 452 U.S. 155, 101 S. Ct. 2239, 68 L. Ed. 2d 744 (1981).

12 Purtle v. Eldridge Auto Sales, Inc., 91 F.3d 797, 1996 FED App. 0247P (6th Cir. 1996).

13 Bourgeois v. Haynes Const. Co., 728 F.2d 719 (5th Cir. 1984).

End of Document

17 Am. Jur. 2d Consumer Protection § 137

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

4. Civil Liability

b. Damages and Fees Recoverable; Setoff or Counterclaim

§ 137. Statutory damages in class action

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 67

A.L.R. Library

Civil remedies of consumer for violations of credit transactions provisions of Truth in Lending Act (TILA) (15 U.S.C.A. secs. 1601 et seq.), as amended by Truth in Lending Simplification and Reform Act of 1982, 113 A.L.R. Fed. 173

Propriety, under Rule 23 of the Federal Rules of Civil Procedure, of class action for violation of Truth in Lending Act (15 U.S.C.A. secs. 1601 et seq.), 61 A.L.R. Fed. 603

Trial Strategy

Class Action for Failure to Disclose Under the Truth-in-Lending Act and Regulation Z, 76 Am. Jur. Proof of Facts 3d 193

Forms

Forms relating to class actions, generally, see Am. Jur. Pleading and Practice Forms—Truth in Lending and Consumer Credit Protection; Federal Procedural Forms (L.Ed.)—Consumer Credit Protection [Westlaw® Search Query]

The amount recoverable in a class action under the Truth in Lending Act is as the court may allow except that as to each member of the class, no minimum recovery is applicable, and the total recovery in any class action or series of class actions arising out of one creditor's same failure to comply is limited.[1] In determining the amount of the award in any class action, the court must consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.[2]

Observation:

In expressly recognizing class actions, Congress did not create a statutory right to bring a class action.[3] While class actions are expressly contemplated by the Act, there is no indication of a legislative intent that they are generally the preferred procedure.[4] Therefore, the effect of this provision is to leave Fed. R. Civ. P. 23 to be applied to truth-in-lending cases, precisely as it applies to other cases.[5]

Footnotes

1 15 U.S.C.A. § 1640(a)(2)(B).
A class of consumers who sued a lender under the Truth in Lending Act for failure to make proper disclosures for mortgage financing of consumers' purchases of town houses were properly awarded statutory damages under 15 U.S.C.A. § 1640(a)(2)(B) rather than actual damages where, although the class contended that loan points paid to the builder, which arranged financing, constituted an illegal finance charge that should be considered damage actually incurred, and the mere fact that class members were led to believe that they were paying loan points directly to the lender and not as reimbursement to the builder did not render the charge illegal, since the consumers contracted to pay the lending institution's closing costs, which included loan points and all other costs directly related to the mortgage, and this was not unreasonable since they were the ultimate recipients of the loans. Adiel v. Chase Federal Sav. and Loan Ass'n, 810 F.2d 1051 (11th Cir. 1987).

2 15 U.S.C.A. § 1640(a).
A district court abused its discretion in awarding one-half of the maximum damages awardable to the class under 15 U.S.C.A. § 1640(a)(2)(B) in the face of its own finding that while the frequency and persistence

of the creditor's actions weighed in favor of a substantial award for the class, the absence of actual damages, the creditor's limited resources, the number of people adversely affected, and the unintentional nature of the creditor's actions, all weighed against such an award. Postow v. OBA Federal Sav. and Loan Ass'n, 627 F.2d 1370 (D.C. Cir. 1980).

3 Marsh v. First USA Bank, N.A., 103 F. Supp. 2d 909 (N.D. Tex. 2000).

4 Fitzgerald v. Northeastern Hospital of Philadelphia, 418 F. Supp. 1041, 23 Fed. R. Serv. 2d 1363 (E.D. Pa. 1976).

5 Kaminski v. Shawmut Credit Union, 416 F. Supp. 1119, 21 Fed. R. Serv. 2d 1332 (D. Mass. 1976).

A trial court did not abuse its discretion by holding that a Truth in Lending Act class action did not meet the superiority requirement of Rule 23(b)(3) since, although technical violations may be sufficient to sustain liability in an individual action, those violations may be too technical in particular cases to form a basis for maintaining a class action and since the purpose of the Act is to ensure compliance by creditors and not to punish the unwary violator. Shroder v. Suburban Coastal Corp., 729 F.2d 1371, 39 Fed. R. Serv. 2d 139 (11th Cir. 1984).

For another case applying Fed. R. Civ. P. 23, see Veal v. Crown Auto Dealerships, Inc., 236 F.R.D. 572 (M.D. Fla. 2006).

As to the requirements of Fed. R. Civ. P. 23, see Am. Jur. 2d, Federal Courts §§ 1547 to 1954.

End of Document

17 Am. Jur. 2d Consumer Protection § 138

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection

Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

4. Civil Liability

b. Damages and Fees Recoverable; Setoff or Counterclaim

§ 138. Costs and attorney's fees

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 67

A.L.R. Library

Award of attorney's fees under sec. 130(a) of Truth in Lending Act (15 U.S.C.A. sec. 1640(a)), 140 A.L.R. Fed. 557

In the case of any successful action to enforce creditor liability, or in any action in which a person is determined to have a right of rescission,[1] the creditor is liable for the costs of the action, together with reasonable attorney's fees as determined by the court.[2] A prevailing defendant cannot recover fees.[3]

An award of attorney's fees is mandatory if the consumer prevails.[4] A prevailing plaintiff need not prove that he or she suffered actual monetary damages to recover attorney's fees.[5] It is possible for a Truth in Lending Act plaintiff to obtain attorney's fees for a stage of litigation at which he or she does not prevail,[6] and the statutory award includes compensation for an attorney's work on appeal.[7]

Pro se parties, usually attorneys representing themselves, have not been granted attorney's fees.[8] Moreover, while there is authority to the contrary,[9] an attorney's fees award is generally not denied merely because the services are performed by a legal aid attorney.[10] The right to fees has also been considered where there was a contingent fee contract,[11] or there has been a settlement.[12]

Caution:

A settlement agreement may be interpreted as precluding a fee award.[13]

With regard to standing to maintain an independent action to obtain a fee award, it is generally held that the award belongs to the client, not the attorney.[14]

Footnotes

1 § 123.

2 15 U.S.C.A. § 1640(a)(3).

3 Postow v. OBA Federal Sav. and Loan Ass'n, 627 F.2d 1370 (D.C. Cir. 1980) (this does not deny defendants due process or equal protection); Boksa v. Keystone Chevrolet Co., 553 F. Supp. 958 (N.D. Ill. 1982).

4 Purtle v. Eldridge Auto Sales, Inc., 91 F.3d 797, 1996 FED App. 0247P (6th Cir. 1996).

5 Rhodes v. Brigano, 91 F.3d 803, 1996 FED App. 0246P (6th Cir. 1996); Lowery v. Finance America Corp., 32 N.C. App. 174, 231 S.E.2d 904 (1977).

6 Nigh v. Koons Buick Pontiac GMC, Inc., 478 F.3d 183 (4th Cir. 2007).

7 Nigh v. Koons Buick Pontiac GMC, Inc., 478 F.3d 183 (4th Cir. 2007); Purtle v. Eldridge Auto Sales, Inc., 91 F.3d 797, 1996 FED App. 0247P (6th Cir. 1996); Long v. Storms, 52 Or. App. 685, 629 P.2d 827 (1981).

8 White v. Arlen Realty & Development Corp., 614 F.2d 387 (4th Cir. 1980); Belmont v. Associates Nat. Bank (Delaware), 119 F. Supp. 2d 149 (E.D. N.Y. 2000).

9 In re Pittman, 165 B.R. 586 (Bankr. D. Md. 1994).

10 Sellers v. Wollman, 510 F.2d 119, 29 A.L.R. Fed. 899 (5th Cir. 1975); Kessler v. Associates Financial Services Co. of Hawaii, Inc., 639 F.2d 498 (9th Cir. 1981); Campbell v. Liberty Financial Planning, Inc., 422 F. Supp. 1386 (D. Neb. 1976); Jones v. Allied Loans, Inc., 447 F. Supp. 1121 (D.S.C. 1977); Jones v. Seldon's Furniture Warehouse, Inc., 357 F. Supp. 886 (E.D. Va. 1973); In re Veneziale, 267 B.R. 695 (Bankr. E.D. Pa. 2001).

11 Smith v. South Side Loan Co., 567 F.2d 306 (5th Cir. 1978) (attorney lacked standing to recover fee).

12 Gram v. Bank of Louisiana, 691 F.2d 728 (5th Cir. 1982); James v. Home Const. Co. of Mobile, 689 F.2d 1357 (11th Cir. 1982) (disapproved of on other grounds by, Evans v. Jeff D., 475 U.S. 717, 106 S. Ct. 1531, 89 L. Ed. 2d 747, 4 Fed. R. Serv. 3d 321 (1986)).

13 Zeisler v. Neese, 24 F.3d 1000, 140 A.L.R. Fed. 791 (7th Cir. 1994).

14 Smith v. South Side Loan Co., 567 F.2d 306 (5th Cir. 1978); Zeisler v. Neese, 24 F.3d 1000, 140 A.L.R. Fed. 791 (7th Cir. 1994).

End of Document

17 Am. Jur. 2d Consumer Protection § 139

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

4. Civil Liability

b. Damages and Fees Recoverable; Setoff or Counterclaim

§ 139. Costs and attorney's fees—Determination of amount of fees

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 67

A.L.R. Library

Award of attorney's fees under sec. 130(a) of Truth in Lending Act (15 U.S.C.A. sec. 1640(a)), 140 A.L.R. Fed. 557

A court awarding attorney's fees under the Truth in Lending Act attempts to approximate the fee the lawyer would have obtained in the market for the legal services provided,[1] using a "lodestar" analysis, in which the court determines a reasonable rate and multiplies it by the number of attorney hours reasonably expended on the case,[2] and considering the usual factors.[3] The party seeking attorney's fees has the burden to establish each relevant factor, and the trial court must render explicit findings on them but is not obliged to address factors that lack evidentiary support.[4]

The determination of the reasonableness of an award is within the trial court's sound discretion.[5] The reasonableness of the fee depends upon the particular circumstances of the case.[6] The fee awarded may exceed the amount of actual and statutory damages recovered[7] although it has been suggested that the excess should not be too great.[8] There is authority that the amount

should not be reduced solely because the plaintiff was successful on only one of several claims;[9] however, it has also been held that a court may discount an award when some of the time spent by the attorneys was devoted to unsuccessful claims.[10] A plaintiff who prevails on common-law claims may recover the amount of fees claimed where the claims arose from the same set of operative facts as those presented under the Truth in Lending Act.[11] However, there must be some evidence of what constitutes a reasonable fee, either through hearings, stipulations, or agreements by the parties.[12] The use of a court clerk's fee schedule applicable to judgments by confession cannot form the basis of an award.[13]

Footnotes

1 Fogle v. William Chevrolet/Geo, Inc., 275 F.3d 613 (7th Cir. 2001) (hourly rate and number of hours claimed reduced).

2 Lyon v. Chase Bank USA, N.A., 656 F.3d 877 (9th Cir. 2011); Federal Trade Com'n v. Circa Direct LLC, 912 F. Supp. 2d 165 (D.N.J. 2012).

3 Strange v. Monogram Credit Card Bank of Georgia, 129 F.3d 943 (7th Cir. 1997); Varner v. Century Finance Co., Inc., 738 F.2d 1143, 39 U.C.C. Rep. Serv. 1047 (11th Cir. 1984); In re Derienzo, 282 B.R. 586 (Bankr. M.D. Pa. 2002).
As to the factors considered when a court awards attorney's fees, see Am. Jur. 2d, Attorneys at Law §§ 286 to 299.

4 Purtle v. Eldridge Auto Sales, Inc., 91 F.3d 797, 1996 FED App. 0247P (6th Cir. 1996) (court considered all relevant factors); Varner v. Century Finance Co., Inc., 738 F.2d 1143, 39 U.C.C. Rep. Serv. 1047 (11th Cir. 1984).

5 Strange v. Monogram Credit Card Bank of Georgia, 129 F.3d 943 (7th Cir. 1997); Bradford v. HSBC Mortg. Corp., 859 F. Supp. 2d 783 (E.D. Va. 2012).

6 Thomas v. Myers-Dickson Furniture Co., 479 F.2d 740 (5th Cir. 1973).

7 Purtle v. Eldridge Auto Sales, Inc., 91 F.3d 797, 1996 FED App. 0247P (6th Cir. 1996).
The fact that the attorney's fees requested were almost equal to the benefit achieved in the litigation did not warrant a reduction where a loan transaction was rescinded and the borrower obtained the maximum benefit expected and successfully vindicated the Act's purposes. Allright Mortg. Co. v. Hill, 213 B.R. 943 (D. Md. 1997).

8 Leathers v. Peoria Toyota-Volvo, 824 F. Supp. 155 (C.D. Ill. 1993).

9 Reneau v. Mossy Motors, 622 F.2d 192 (5th Cir. 1980); Hayer v. National Bank of Alaska, 619 P.2d 474 (Alaska 1980).

10 Bradford v. HSBC Mortg. Corp., 859 F. Supp. 2d 783 (E.D. Va. 2012).

11 Greene v. Gibraltar Mortg. Inv. Corp., 529 F. Supp. 186 (D.D.C. 1981).

12 Mirabal v. General Motors Acceptance Corp., 576 F.2d 729 (7th Cir. 1978); Mitchell v. Security Inv. Corp. of Palm Beaches, 464 F. Supp. 650 (S.D. Fla. 1979); Leathers v. Peoria Toyota-Volvo, 824 F. Supp. 155 (C.D. Ill. 1993) (supporting affidavit required).
An affidavit of another attorney, supporting counsel's claim that his services commanded a particular hourly rate, was not admissible under the *Daubert* standard. Fogle v. William Chevrolet/Geo, Inc., 275 F.3d 613 (7th Cir. 2001).

13 Mt. Vernon Memorial Estates, Inc. v. Wood, 88 Ill. App. 3d 666, 43 Ill. Dec. 862, 410 N.E.2d 995 (1st Dist. 1980).

17 Am. Jur. 2d Consumer Protection § 140

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

4. Civil Liability

b. Damages and Fees Recoverable; Setoff or Counterclaim

§ 140. Single or multiple recoveries; multiple obligors

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 67

A.L.R. Library

Civil remedies of consumer for violations of credit transactions provisions of Truth in Lending Act (TILA) (15 U.S.C.A. secs. 1601 et seq.), as amended by Truth in Lending Simplification and Reform Act of 1982, 113 A.L.R. Fed. 173

The Truth in Lending Act provides that the multiple failure to disclose to any person any information required under certain provisions entitles the person to a single recovery, but a continued failure to disclose after a recovery has been granted gives rise to rights to additional recoveries.[1] This provision does not bar any remedy permitted by the rescission provision.[2] A creditor can be liable only for a single recovery even though there are multiple violations within a single transaction;[3] thus, where the purchaser of an automobile is entitled to recover on the basis of an undisclosed documentary fee, it is unnecessary to consider whether the failure to furnish a license tag constitutes a truth-in-lending violation.[4]

The Act also provides that when there are multiple obligors in a consumer credit transaction or consumer lease, there may be no more than one recovery of damages for a violation of the Act.[5]

Footnotes

1 15 U.S.C.A. § 1640(g).

2 15 U.S.C.A. § 1640(g).

3 In re Robertson, 333 B.R. 894 (Bankr. M.D. Fla. 2005).

4 Jackson v. Columbus Dodge, Inc., 676 F.2d 120 (5th Cir. 1982).

5 15 U.S.C.A. § 1640(d).

End of Document

17 Am. Jur. 2d Consumer Protection § 141

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection

Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

4. Civil Liability

b. Damages and Fees Recoverable; Setoff or Counterclaim

§ 141. Setoff or counterclaim

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 61.1

A.L.R. Library

Claim for underlying debt as compulsory or permissive in action asserting creditor's civil liability under sec. 130(a) of Truth in Lending Act (15 U.S.C.A. sec. 1640(a)) for violation of Act, 51 A.L.R. Fed. 509

Right to set off debt discharged in bankruptcy against claim brought under Truth in Lending Act (15 U.S.C.A. secs. 1601 et seq.), 43 A.L.R. Fed. 413

The Truth in Lending Act provides that a person may not take any action to offset any amount for which a creditor or assignee[1] is potentially liable to that person for civil penalties against any amount owed by that person unless the amount of the creditor's or assignee's liability under the Act has been determined by a judgment of a court of competent jurisdiction in an action to which that person was a party.[2]

The statute precludes a consumer from evading payment on the obligation by deducting a statutory penalty from his or her payment without first having had the creditor's liability judicially determined.[3]

The statute also provides that its provisions do not bar a consumer then in default on the obligation from asserting a violation of the Act as an original action or as a defense or counterclaim to an action to collect amounts owed by the consumer brought by a person liable under the Act.[4] Thus, the statute does not affect the recoupment exception to the statute of limitations,[5] and the borrower may assert a violation as a counterclaim despite the expiration of the one-year limitation period.[6]

A consumer's recovery of statutory damages is subject to a setoff where the creditor has furnished value and the consumer has benefited.[7] However, in a class action by consumers, a creditor's counterclaims have been dismissed on the ground that they are permissive, and their allowance would unduly complicate the resolution of the truth-in-lending claims.[8]

Caution:

If a Truth in Lending Act claim is considered compulsory under local pleading rules, a failure to assert it will preclude the court from addressing it.[9]

Footnotes

1 As to liability of assignees, see § 127.

2 15 U.S.C.A. § 1640(h).
A lender was not allowed to satisfy an adverse judgment under the Truth in Lending Act by reducing claims against the debtor in other courts. Dias v. Bank of Hawaii, 732 F.2d 1401 (9th Cir. 1984).
However, this provision did not bar a cross-complaint by a bank, as assignee of a retail-installment contract, against a retailer for exoneration in the event of a judgment against it upon a complaint filed against the bank under the Truth in Lending Act. Rounds v. Community Nat. Bank in Monmouth, 454 F. Supp. 883 (S.D. Ill. 1978).

3 Grey v. European Health Spas, Inc., 428 F. Supp. 841 (D. Conn. 1977); Reid v. Liberty Consumer Discount Co. of Pennsylvania, 484 F. Supp. 435, 28 Fed. R. Serv. 2d 1318 (E.D. Pa. 1980).

4 15 U.S.C.A. § 1640(h).

5 § 130.

6 Public Finance Corp. v. Riddle, 83 Ill. App. 3d 417, 38 Ill. Dec. 712, 403 N.E.2d 1316 (3d Dist. 1980).

7 Kedziora v. Citicorp Nat. Services, Inc., 901 F. Supp. 1321 (N.D. Ill. 1995), judgment aff'd, 89 F.3d 379 (7th Cir. 1996) (even though setoff exceeded the damages resulting from a breach of the Consumer Leasing Act, resulting in a judgment of $0); Engle v. Shapert Const. Co., 443 F. Supp. 1383 (M.D. Pa. 1978).

8 Valencia v. Anderson Bros. Ford, 617 F.2d 1278, 29 Fed. R. Serv. 2d 549 (7th Cir. 1980), judgment rev'd on other grounds, 452 U.S. 205, 101 S. Ct. 2266, 68 L. Ed. 2d 783 (1981); Jacklitch v. Redstone Federal Credit Union, 463 F. Supp. 1134 (N.D. Ala. 1979).

9 R-G Financial Corp. v. Vergara-Nunez, 381 F. Supp. 2d 1 (D.P.R. 2005), aff'd, 446 F.3d 178 (1st Cir. 2006) (mortgagors' TILA claims arose out of the same transaction that engendered mortgagees' foreclosure proceedings).

End of Document

17 Am. Jur. 2d Consumer Protection § 142

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection

Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

5. Criminal Liability

§ 142. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 68

The Truth in Lending Act provides that whoever willfully and knowingly gives false or inaccurate information or fails to provide information that it is required to disclose under the Act or any implementing regulation, or uses any chart or table authorized by the Bureau of Consumer Financial Protection in such a manner as to consistently underestimate the annual percentage rate, or otherwise fails to comply with any requirements imposed by the Act is subject to a fine and imprisonment.[1] The criminal penalty may not be imposed upon designated governmental agencies.[2]

Footnotes

1 15 U.S.C.A. § 1611.

2 § 146.

17 Am. Jur. 2d Consumer Protection § 143

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

6. Statutory Defenses

§ 143. Error corrected

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 60, 62

A.L.R. Library

Civil remedies of consumer for violations of credit transactions provisions of Truth in Lending Act (TILA) (15 U.S.C.A. secs. 1601 et seq.), as amended by Truth in Lending Simplification and Reform Act of 1982, 113 A.L.R. Fed. 173

Forms

Forms relating to error corrected, see Am. Jur. Pleading and Practice Forms—Truth in Lending and Consumer Credit Protection; Federal Procedural Forms (L.Ed.)—Consumer Credit Protection [Westlaw® Search Query]

A creditor or assignee has no liability for civil remedies[1] or under the provisions of the Truth in Lending Act pertaining to administrative enforcement[2] and criminal liability[3] for any failure to comply with any requirement imposed under the provisions

of the Act governing disclosures[4] or consumer leasing[5] if, within 60 days after discovering an error, whether pursuant to a final, written examination report or notice,[6] or through the creditor's or assignee's own procedures, and prior to the institution of an action for a civil penalty or the receipt of written notice of the error from the obligor, the creditor or assignee notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to assure that the person will not be required to pay an amount in excess of the charge actually disclosed or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower.[7] However, a creditor may not rely on a later document to cure omissions in required disclosures where the creditor fails to provide the consumer with notice that the first document contained errors and that the second document is intended to correct them.[8]

Footnotes

1 §§ 124 to 141.

2 §§ 109 to 112.

3 § 142.

4 §§ 15 to 89.

5 §§ 100 to 107.

6 Issued under 15 U.S.C.A. § 1607(e)(1), discussed in § 112.

7 15 U.S.C.A. § 1640(b).

Except in circumstances in which the error arises from the good faith use of a calculation tool, and that error is promptly remedied upon discovery, a misstatement of more than ⅛th of a percent in the annual percentage rate constitutes a violation of the Act. Williams v. Chartwell Financial Services, Ltd., 204 F.3d 748, 45 Fed. R. Serv. 3d 1410 (7th Cir. 2000).

The fact that the parties to a credit agreement abandoned the transaction and the creditor refunded the borrower's money was insufficient to relieve the creditor from liability under 15 U.S.C.A. § 1640(b) for failure to make the required disclosures. Dryden v. Lou Budke's Arrow Finance Co., 630 F.2d 641 (8th Cir. 1980).

8 James v. City Home Service, Inc., 712 F.2d 193 (5th Cir. 1983).

End of Document

17 Am. Jur. 2d Consumer Protection § 144

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

6. Statutory Defenses

§ 144. Unintentional violation resulting from bona fide error

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 62

A.L.R. Library

What constitutes Truth in Lending Act violation which "was not intentional and resulted from bona fide error notwithstanding maintenance of procedures reasonably adapted to avoid any such error" within meaning of sec. 130(c) of Act (15 U.S.C.A. sec. 1640(c)), 153 A.L.R. Fed. 193

Forms

Forms relating to unintentional violation or bona fide errors, see Am. Jur. Pleading and Practice Forms—Truth in Lending and Consumer Credit Protection; Federal Procedural Forms (L.Ed.)—Consumer Credit Protection [Westlaw® Search Query]

A creditor or assignee may not be held liable for damages[1] or rescission[2] for a violation of the Truth in Lending Act, if the creditor or assignee shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide

error, notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.[3] The statute places the burden on the creditor, or the creditor's assignee,[4] and, in effect, means that when a violation is shown, the debtor has a prima facie right to recover.[5] A proven violation of the disclosure requirements is presumed to injure the borrower.[6]

Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programming, and printing errors.[7] On the other hand, an error of legal judgment with respect to a person's obligations under the Act is not a bona fide error.[8] Thus, a creditor generally does not escape from liability for violations resulting from a mistaken interpretation of disclosure requirements,[9] or ignorance of the law,[10] and misplaced reliance on the advice of counsel resulting in a mistake of law is not the sort of error contemplated by the Act.[11] Moreover, the bona fide error defense requires an extra step to prevent the type of error which occurred, in other words, something more than just having a practice of delegating compliance with the Truth in Lending Act to someone else and instructing that agent about the legal requirements.[12]

Footnotes

1 §§ 124 to 141.

2 §§ 113 to 123.

3 15 U.S.C.A. § 1640(c).

A process which included a software program designed to produce documents in compliance with the regulations, auditing notices before closing, and auditing notices after closing was sufficient to allow a mortgagee to claim the bona fide error defense. Palmer v. Ameribanq Mortgage Group, LLC, 2010 WL 3933273 (E.D. Pa. 2010).

A creditor's failure to include the origination fee in the finance charge was not a bona fide error where the creditor maintained no procedure to avoid the error; no one at the creditor's office reviewed the disclosure to verify its accuracy; instead, the creditor relied entirely upon the settlement attorney. Abel v. Knickerbocker Realty Co., 846 F. Supp. 445, 153 A.L.R. Fed. 683 (D. Md. 1994).

4 Abubo v. Bank of New York Mellon, 2013 WL 5631035 (D. Haw. 2013).

5 Martin v. Glenn's Furniture Co., Inc., 126 Ga. App. 692, 191 S.E.2d 567 (1972).

A mortgagee's violation of the clear and conspicuous disclosure requirement, by providing a mortgagor with two inconsistent mortgage rescission rights forms, incorrectly suggesting that the mortgagor had the right to rescind only the difference between the new loan and the original loan, when in fact she had the right to rescind the entire loan, did not qualify for treatment under the safe harbor provision where the mortgagee was unable to describe any system used to ensure that only the correct rescission form would be provided to mortgagors. Handy v. Anchor Mortg. Corp., 464 F.3d 760 (7th Cir. 2006).

6 Herrera v. First Northern Sav. and Loan Ass'n, 805 F.2d 896, 6 Fed. R. Serv. 3d 878 (10th Cir. 1986).

7 15 U.S.C.A. § 1640(c).

On the basis that the defense includes, but is not limited to, clerical and calculation errors, it could be asserted where an automobile dealer incorrectly included a charge for an accessory that was not installed on the vehicle. Nigh v. Koons Buick Pontiac GMC, Inc., 143 F. Supp. 2d 563 (E.D. Va. 2001).

8 15 U.S.C.A. § 1640(c).

9 Doggett v. Ritter Finance Co. of Louisa, 384 F. Supp. 150 (W.D. Va. 1974), judgment aff'd in part, rev'd in part on other grounds, 528 F.2d 860 (4th Cir. 1975).

10 Jacklitch v. Redstone Federal Credit Union, 463 F. Supp. 1134 (N.D. Ala. 1979); French v. Wilson, 446 F. Supp. 216 (D.R.I. 1978) (rejected on other grounds by, Brown v. National Permanent Federal Sav. and Loan Ass'n, 683 F.2d 444 (D.C. Cir. 1982)).

11 Haynes v. Logan Furniture Mart, Inc., 503 F.2d 1161, 19 Fed. R. Serv. 2d 205, 27 A.L.R. Fed. 592 (7th Cir. 1974).

12 Abubo v. Bank of New York Mellon, 2013 WL 5631035 (D. Haw. 2013).

End of Document

17 Am. Jur. 2d Consumer Protection § 145

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

6. Statutory Defenses

§ 145. Reliance on rules or interpretations of Bureau of Consumer Financial Protection

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 62

A.L.R. Library

Good faith defense to Truth in Lending Act liability, under sec. 130(f) of Act (15 U.S.C.A. sec. 1640(f)), 50 A.L.R. Fed. 201

Forms

Forms relating to good faith reliance of rule or regulation, see Am. Jur. Pleading and Practice Forms—Truth in Lending and Consumer Credit Protection; Federal Procedural Forms (L.Ed.)—Consumer Credit Protection [Westlaw® Search Query]

The Truth in Lending Act provides that provisions dealing with civil damages,[1] administrative enforcement,[2] and criminal penalties[3] may not be applied to any act done or omitted in good faith in conformity with Bureau of Consumer Financial Protection rules or regulations or in conformity with any interpretation or approval by an official or employee of the Federal

Reserve System duly authorized by the Bureau to issue such interpretations or approvals under such procedures as the Bureau may prescribe.[4] This defense applies even if the rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason after the act at issue occurred.[5]

For the statutory defense to be available, the creditor must act in conformity with the interpretation allegedly relied upon in good faith.[6] A creditor is not protected by supposed reliance upon an amendatory regulation or revised interpretation issued after the transaction took place[7] or on documents issued by the Bureau of Consumer Financial Protection subsequent to a violation.[8]

A creditor must prove good-faith reliance.[9] Good-faith reliance on official interpretations of the Bureau,[10] staff opinion letters,[11] and a model form promulgated by the Bureau[12] are sufficient. The defense is also available where the creditor relied upon a Bureau interpretation incorporated in an implementing regulation.[13] On the other hand, good-faith reliance on staff opinion letters,[14] unofficial staff opinions,[15] and unofficial pamphlets or forms[16] are insufficient. Furthermore, the fact that a retail-installment contract conforms to the format of the model forms does not excuse misrepresentations of the amounts listed in a particular contract as being the actual charges.[17] Asserted reliance on model forms is also not a defense where the regulations indicated that the lender's reading of the forms was incorrect.[18]

Of course, a determination whether a violation occurred is necessary before considering whether the lender has a good-faith defense.[19]

Footnotes

1 §§ 124 to 141.

2 §§ 109 to 112.

3 § 142.

4 15 U.S.C.A. § 1640(f).

5 15 U.S.C.A. § 1640(f).

6 Murphy v. Beneficial Finance Co. of Central Ohio, 443 F. Supp. 463 (S.D. Ohio 1976).

7 Jones v. Bill Heard Chevrolet, Inc., 212 F.3d 1356 (11th Cir. 2000) (overruled on other grounds by, Turner v. Beneficial Corp., 242 F.3d 1023 (11th Cir. 2001)); Matter of Dickson, 432 F. Supp. 752 (W.D. N.C. 1977).

8 McGowan v. Credit Center of North Jackson, Inc., 546 F.2d 73 (5th Cir. 1977) (rejected on other grounds by, Cain v. Bethea, 2007 WL 2859681 (E.D. N.Y. 2007)) (referring to the Federal Reserve Board, formerly responsible for administering the Act).

9 Valencia v. Anderson Bros. Ford, 617 F.2d 1278, 29 Fed. R. Serv. 2d 549 (7th Cir. 1980), judgment rev'd on other grounds, 452 U.S. 205, 101 S. Ct. 2266, 68 L. Ed. 2d 783 (1981).

10 Ives v. W. T. Grant Co., 522 F.2d 749 (2d Cir. 1975); Boksa v. Keystone Chevrolet Co., 553 F. Supp. 958 (N.D. Ill. 1982).

11 Charles v. Krauss Co., Ltd., 572 F.2d 544, 50 A.L.R. Fed. 192 (5th Cir. 1978).

12 Turner v. General Motors Acceptance Corp., 180 F.3d 451 (2d Cir. 1999) (under Consumer Leasing Act); Brown v. Providence Gas Co., 445 F. Supp. 459 (D.R.I. 1976).

13 Williams v. Bill Watson Ford, Inc., 423 F. Supp. 345 (E.D. La. 1976).

14 Valencia v. Anderson Bros. Ford, 617 F.2d 1278, 29 Fed. R. Serv. 2d 549 (7th Cir. 1980), judgment rev'd on other grounds, 452 U.S. 205, 101 S. Ct. 2266, 68 L. Ed. 2d 783 (1981).

15 Valencia v. Anderson Bros. Ford, 617 F.2d 1278, 29 Fed. R. Serv. 2d 549 (7th Cir. 1980), judgment rev'd on other grounds, 452 U.S. 205, 101 S. Ct. 2266, 68 L. Ed. 2d 783 (1981); Basham v. Finance America Corp., 583 F.2d 918, 26 U.C.C. Rep. Serv. 787 (7th Cir. 1978).

16 Jacklitch v. Redstone Federal Credit Union, 615 F.2d 679, 28 U.C.C. Rep. Serv. 1494 (5th Cir. 1980).

17 Jones v. Bill Heard Chevrolet, Inc., 212 F.3d 1356 (11th Cir. 2000) (overruled on other grounds by, Turner v. Beneficial Corp., 242 F.3d 1023 (11th Cir. 2001)).

18 Tappin v. Bastrop Loan Co., Inc., 610 F.2d 283 (5th Cir. 1980).

19 Jones v. Bill Heard Chevrolet, Inc., 212 F.3d 1356 (11th Cir. 2000) (overruled on other grounds by, Turner v. Beneficial Corp., 242 F.3d 1023 (11th Cir. 2001)).

End of Document

17 Am. Jur. 2d Consumer Protection § 146

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

I. Overview

F. Effect of Noncompliance; Remedies

6. Statutory Defenses

§ 146. Immunity of government and participants in government programs

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 63

A.L.R. Library

Civil remedies of consumer for violations of credit transactions provisions of Truth in Lending Act (TILA) (15 U.S.C.A. secs. 1601 et seq.), as amended by Truth in Lending Simplification and Reform Act of 1982, 113 A.L.R. Fed. 173

No civil or criminal penalty provided under the Truth in Lending Act may be imposed upon the United States or any department or agency, or upon any state or political subdivision, or any agency of any state or political subdivision.[1] Moreover, a creditor participating in a credit program administered, insured, or guaranteed by any federal department or agency may not be held liable for a civil or criminal penalty under the Act in any case in which the violation results from the use of an instrument required by that department or agency.[2] Creditors participating in federal programs may not be held liable under the laws of any state not inconsistent with the Act for any technical or procedural failure—such as a failure to use a specific form, to make information available at a specific place on an instrument, or to use a specific typeface as required by state law—which is caused by the use of an instrument that a federal department or agency requires to be used.[3]

Since federal agencies are to consult with the Bureau of Consumer Financial Protection when developing disclosure forms,[4] the effect of the provision being discussed is that federal agencies are not exempt from the disclosure requirements, but the remedies that may be available for violations of the Act are limited.[5] For example, while the Department of Housing and Urban Development, when making a loan to a consumer, is required to comply with the Truth in Lending Act, it is exempt from monetary liability.[6] While, similarly, a penalty cannot be assessed against the Federal Deposit Insurance Corporation, as the assignee of an insolvent bank, the FDIC is not exempt from a claim for rescission.[7]

Nongovernmental assignees of loans from federal agencies, that are independent contractors, are not entitled to the government's immunity.[8]

Footnotes

1 15 U.S.C.A. § 1612(b).

2 15 U.S.C.A. § 1612(c).

3 15 U.S.C.A. § 1612(d).

4 15 U.S.C.A. § 1612(a).

5 In re Pinder, 83 B.R. 905 (Bankr. E.D. Pa. 1988).

6 In re Gillespie, 110 B.R. 742, 113 A.L.R. Fed. 705 (Bankr. E.D. Pa. 1990).

7 Federal Deposit Ins. Corp. v. Hughes Development Co., Inc., 684 F. Supp. 616 (D. Minn. 1988).
As to the right of rescission, see §§ 113 to 123.

8 In re Gillespie, 110 B.R. 742, 113 A.L.R. Fed. 705 (Bankr. E.D. Pa. 1990); In re Pinder, 83 B.R. 905 (Bankr. E.D. Pa. 1988).